

# EXHIBIT E

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF OHIO  
EASTERN DIVISION

In re FIRSTENERGY CORP. SECURITIES  
LITIGATION

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Civil Action No. 2:20-cv-03785-ALM-KAJ

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EXPERT REPORT OF  
W. SCOTT DALRYMPLE, CFA  
JUNE 6, 2022

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## TABLE OF CONTENTS

|   | <u>Page</u> |
|---|-------------|
| I. Scope of the Engagement .....  | 1           |
| II. Credentials and Compensation.....   | 1           |
| III. Information Considered.....  | 2           |
| IV. Summary of Opinions.....  | 3           |
| V. Background .....   | 3           |
| A. The Class .....  | 3           |
| B. FirstEnergy.....   | 3           |
| C. Allegations.....   | 4           |
| 1) Bankruptcy Proceedings .....   | 4           |
| 2) Pursuit of “Legislative or Regulatory Solutions” .....   | 5           |
| 3) Investigation into FirstEnergy and Aftermath.....  | 6           |
| 4) Summary .....  | 8           |
| VI. Assessment of Market Efficiency .....   | 9           |
| A. <i>Cammer</i> Factors .....  | 10          |
| 1) <i>Cammer</i> Factor 1: Average Weekly Trading Volume .....  | 10          |
| 2) <i>Cammer</i> Factor 2: Analyst Coverage .....   | 12          |
| 3) <i>Cammer</i> Factor 3: Existence of Market Makers/Institutional Investors and Arbitrageurs.....                           | 13          |
| 4) <i>Cammer</i> Factor 4: Eligibility to File an S-3 Registration Statement.....   | 15          |
| 5) <i>Cammer</i> Factor 5: Empirical Evidence of Cause-and-Effect Relationship Between Events and Stock Price Movements ..... | 16          |
| B. <i>Krogman</i> Factors.....  | 20          |
| 1) Market Capitalization and Public Float .....   | 20          |
| 2) Bid-Ask Spread .....   | 21          |
| C. Additional Indicators of Market Efficiency .....   | 21          |
| 1) Statistical Properties of Stock Returns (Autocorrelation).....   | 21          |
| 2) Lack of Constraints on Short Selling.....  | 22          |
| D. Conclusion .....   | 24          |
| VII. Measuring Damages to Shareholders on a Class-wide Basis.....   | 26          |
| VIII. Further Work .....  | 27          |



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Re: *In re* FirstEnergy Corporation Securities Litigation, U.S. District Court, Southern District of Ohio, No. 2:20-cv-03785-ALM-KAJ.

## I. Scope of the Engagement

1. I have been retained by Robbins Geller Rudman & Dowd LLP, counsel for Los Angeles County Employees Retirement Association (“LACERA”), Amalgamated Bank, Wisconsin Laborers’ Pension Fund, and City of Irving Supplemental Benefit Plan, individually and on behalf of all others similarly situated (collectively, “Plaintiffs”), in the above-styled case to analyze whether common stock in FirstEnergy Corporation, Inc. (“FirstEnergy” or “FE”) traded in an efficient market during the period between February 21, 2017 and July 21, 2020 (the “Class Period”). I have also been retained to determine whether damages in this matter can be calculated using a common methodology for all Class members pursuant to their claims.

2. Generally, I understand Plaintiffs allege that throughout the Class Period, “FirstEnergy and its most senior executives bankrolled one of the largest corruption and bribery schemes in U.S. history” in an attempt to promote legislation that would benefit FirstEnergy at the expense of ratepayers.<sup>1</sup>

3. Generally, I further understand Plaintiffs allege that Defendants made numerous materially misleading statements and omissions regarding FirstEnergy’s business and operations and kept the corruption and bribery scheme concealed from investors.<sup>2</sup> These statements include alleged misrepresentations and omissions associated with FirstEnergy’s improper political contributions and political activities, as well as alleged misrepresentations and omissions regarding FirstEnergy’s compliance with regulatory requirements such as anti-corruption policies and FE’s own internal policies and code of conduct.

4. Defendants’ scheme to defraud and their materially misleading statements and omissions, according to Plaintiffs, caused the price of FirstEnergy stock to be artificially inflated during the Class Period.

## II. Credentials and Compensation

5. I, W. Scott Dalrymple, am a Partner at BVA Group LLC (“BVA Group”). I am an economist and a CFA charter holder with extensive experience in economic, financial, and statistical analyses. During my career, I have worked on issues relating to the analysis of economic damages involving securities litigation,

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<sup>1</sup> Consolidated Complaint for Violations of the Federal Securities Laws, dated Feb. 26, 2021 (“Consolidated Complaint”), ¶ 3.

<sup>2</sup> The “Defendants,” “Exchange Act Defendants,” and the “Securities Act Defendants” are set forth and defined in the Consolidated Complaint at ¶¶ 27-39 and 277-284.

business valuation, structured finance, financial derivatives, antitrust, intellectual property, and breach of contract. I have advised companies, investors, financial institutions, and government agencies in the U.S., Europe, and Australia on a range of matters, including valuation and securities analysis, market structure, capital restructurings, financial and economic modeling, and quantitative methods.

6. I have been retained as a consulting and testifying expert in a wide range of matters involving financial markets and securities, including equities, fixed income, structured products, and derivatives. I have been involved in shareholder class action matters in the U.S. and Australia on issues related to share price inflation, market efficiency, and shareholder damages. I have provided expertise on numerous litigation matters involving financial, economic, statistical, and valuation analysis.

7. I hold a Master of Science in economics with a concentration in Industrial Organization from the London School of Economics and Political Science and a Bachelor of Business Administration in the Business Honors Program and Finance from the University of Texas at Austin. I have written about and presented on economic and financial topics, including financial markets and securities analysis, and have provided expert opinions on these topics in a number of federal court, state court, and arbitration proceedings. My full curriculum vitae, including testimony history and publications, is attached as **Appendix A**.

8. BVA Group is being compensated at the rate of \$750 per hour for my work in this matter. As part of performing my analysis, I utilized a team of BVA Group personnel who worked under my direction and supervision. BVA Group is being compensated for time incurred by other professionals who have supported my analysis in this matter at rates of \$275 to \$675 per hour. Neither BVA Group's nor my compensation depends on opinions provided herein or on the outcome of this litigation.

### **III. Information Considered**

9. I have prepared this report to state my expert opinions; to describe the bases for those opinions; to disclose the facts and data I considered in reaching my opinions; and to make other appropriate disclosures.<sup>3</sup> The work that I conducted in this matter has been informed by my education, knowledge, and experience in economics and finance. The information in this report is based upon discovery to date and the information that is currently available. A listing of the materials I have considered in my work for this matter as of the date of this report is contained in **Appendix B**, as well as the citations presented in this report.<sup>4</sup>

10. I may review, evaluate, and analyze additional data, facts, or information as they become available. I reserve the right to amend or supplement my opinions based upon further information learned,

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<sup>3</sup> Use of the first person "I" in my report refers either to me or to those working under my direct supervision.

<sup>4</sup> In addition to documents referenced in this report and attached appendices, I relied on my education, background, skills, and experience, including a body of knowledge derived from numerous other treatises and case law not specifically identified herein.

produced, or provided to me. Therefore, the analyses and opinions described herein may be subject to change based upon additional information that becomes available or other developments that occur.

#### IV. Summary of Opinions

11. It is my opinion that shares of FirstEnergy traded during the Class Period in a semi-strong-form efficient market in which new information was reflected in the share price.

12. In a semi-strong form efficient market, one may apply widely accepted financial, economic, and valuation techniques to estimate share price inflation, if any, that was attributable to, or was maintained by, Defendants' alleged scheme and/or misrepresentations and omissions throughout the Class Period. The share price inflation, if any, that was present in the stock on each day of the Class Period may be used to arrive at damages for every member of the proposed class using a common method that is grounded in Plaintiffs' theory of liability.

#### V. Background

##### A. The Class

13. I understand that the proposed Class in this matter are persons or entities who acquired FirstEnergy securities between February 21, 2017 and July 21, 2020.<sup>5</sup>

##### B. FirstEnergy

14. FirstEnergy is a for-profit, publicly-traded power company based in Akron, Ohio.<sup>6</sup> FirstEnergy trades under the ticker symbol "FE" on the New York Stock Exchange.<sup>7</sup> FirstEnergy and its subsidiaries "are involved in the generation, transmission, and distribution of electricity."<sup>8</sup>

15. FirstEnergy owned and operated nuclear power generation plants, including the Perry Nuclear Generating Station and the Davis-Besse Nuclear Power Station (the "Nuclear Plants") through their wholly owned subsidiaries, FES and FENOC.<sup>9</sup> It also owned and operated fossil fuel generation plants.<sup>10</sup>

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<sup>5</sup> Consolidated Complaint, ¶ 1. Excluded from the Class are Defendants, the officers and directors of FirstEnergy, FirstEnergy Solutions Corp. ("FES"), FirstEnergy Nuclear Operating Company ("FENOC") and Energy Harbor LLC, Energy Harbor Corp, and Energy Harbor Nuclear Corp. (collectively, "Energy Harbor"), at all relevant times, members of their immediate families and their legal representatives, heirs, successors or assigns, and any entity in which Defendants have or had a controlling interest. See Consolidated Complaint, ¶ 17.

<sup>6</sup> FirstEnergy Form 10-K for period ending Dec. 31, 2019, pp. 1, 10.

<sup>7</sup> FirstEnergy Form 10-K for period ending Dec. 31, 2019, p. 33.

<sup>8</sup> FirstEnergy Form 10-K for period ending Dec. 31, 2019, p. 10.

<sup>9</sup> Consolidated Complaint, ¶¶ 5, 42.

<sup>10</sup> Consolidated Complaint, ¶¶ 41, 45.

### C. Allegations

16. The following is a general summary of the allegations set forth in the Consolidated Complaint. It is not meant to be inclusive of all of Plaintiffs' allegations.

17. I understand Plaintiffs allege that by 2016, FE decided to exit the competitive energy-generation market in order to transition wholly to the regulated energy transmission market.<sup>11</sup> According to Plaintiffs, FE's Nuclear Plants, which were unprofitable to operate and which posed billions of dollars in direct expenses and future environmental liabilities,<sup>12</sup> became an obstacle of this transition and a focal point for investors' concerns.<sup>13</sup> FE allegedly attempted to shed these costs, both through the bankruptcy proceedings and also through the pursuit of favorable legislation through corruption and bribery.<sup>14</sup>

#### 1) Bankruptcy Proceedings

18. Plaintiffs claim that FE attempted to use the bankruptcy process to rid itself of the liabilities from the Nuclear Plants and certain fossil fuel plants.<sup>15</sup> On March 28, 2018, FE announced its intention to shut down the Nuclear Plants.<sup>16</sup> Three days later, on March 31, 2018, FirstEnergy Solutions Corporation, FENOC, and related entities (collectively, "FES and Related Entities")<sup>17</sup> filed for relief under Chapter 11 in the United States Bankruptcy Court for the Northern District of Ohio.<sup>18</sup> After entering FES and Related Entities into bankruptcy, FE allegedly deconsolidated FES and Related Entities from its financial statements, resulting in a \$1.2 billion gain for FE on FE's financial statements, even as FE and FES and Related Entities allegedly remained operationally intertwined.<sup>19</sup>

19. As part of this process, FE allegedly sought a bankruptcy settlement wherein (i) FE would contribute cash, assets, and debt forgiveness, (ii) FES and Related Entities' creditors would release FirstEnergy from liability for FES and Related Entities' debts; and (iii) the bankruptcy court would grant FirstEnergy "sweeping" releases from any and all future claims asserted against FES and Related Entities by parties not involved in the bankruptcy.<sup>20</sup> The proposed settlement allegedly was resisted by multiple stakeholders, including the Department of Justice ("DOJ") on behalf of the Environmental Protection Agency ("EPA"), which stated on March 12, 2019 that "[t]his scheme is an abuse of the bankruptcy system."<sup>21</sup>

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<sup>11</sup> Consolidated Complaint, ¶ 43-44.

<sup>12</sup> Opinion & Order, dated Mar. 7, 2022 ("Opinion & Order"), p. 2.

<sup>13</sup> Consolidated Complaint, ¶ 44.

<sup>14</sup> Opinion & Order, p. 2-3.

<sup>15</sup> Consolidated Complaint, ¶ 50-51.

<sup>16</sup> Consolidated Complaint, ¶ 45.

<sup>17</sup> Following a March 2018 bankruptcy and later reorganization, FES and FENOC were renamed Energy Harbor LLC (a subsidiary of Energy Harbor Corp.) and Energy Harbor Nuclear Corp., respectively. See Consolidated Complaint, note 1.

<sup>18</sup> Consolidated Complaint, ¶ 45.

<sup>19</sup> Consolidated Complaint, ¶ 46.

<sup>20</sup> Consolidated Complaint, ¶ 51.

<sup>21</sup> Consolidated Complaint, ¶¶ 52-56.

20. On April 4, 2019, the bankruptcy court denied the motion to approve FES and Related Entities' disclosure statement, effectively halting the bankruptcy process.<sup>22</sup>

## 2) Pursuit of "Legislative or Regulatory Solutions"

21. At the same time that FirstEnergy pursued bankruptcy for FES and Related Entities, it allegedly pursued political influence in pursuit of what it identified as "legislative or regulatory solutions" in its 2016 Annual Report filed on February 21, 2017.<sup>23</sup> Plaintiffs contend that FE's actions contributed to the passage of Ohio House Bill 6 ("HB6"), which Plaintiffs describe as follows:

[HB6 was] a purported "clean energy" bill designed to incentivize low carbon dioxide emitting power production, in particular nuclear power generation. In addition to a ratepayer-funded \$1.3 billion bailout of the Nuclear Plants, HB6 also included a ratepayer-funded "decoupling" provision worth some \$700 million in subsidized revenues for FirstEnergy. "Decoupling" in this context means that FirstEnergy could charge higher rates for electricity than supply-and-demand principles would otherwise justify, allowing FirstEnergy to lock-in hefty profits regardless of how much electricity ratepayers actually used.<sup>24</sup>

22. As alleged, by early 2017, FirstEnergy began courting State Representative and future Speaker of the Ohio House of Representatives Larry Householder.<sup>25</sup> Shortly thereafter, FirstEnergy allegedly established and began making payments to two new 501(c)(4) organizations (the "501(c)(4) Organizations") that would serve as the covert vehicles for funneling money to Mr. Householder and affiliates.<sup>26</sup>

23. Plaintiffs claim that Defendants "used FirstEnergy money for primary and general elections, successfully placing in office candidates who supported Mr. Householder's bid to become Ohio's Speaker of the House and, ultimately, pass HB6."<sup>27</sup> Externally, the company used its political action committee ("FirstEnergy PAC") to make disclosed corporate contributions.<sup>28</sup> However, Plaintiffs claim that FE contributed and concealed significant amounts of additional payments through the 501(c)(4) Organizations to Mr. Householder, other Ohio politicians, and other parties.<sup>29</sup>

24. I understand Mr. Householder introduced HB6 on April 12, 2019,<sup>30</sup> and on May 29, 2019, the bill passed the Ohio House.<sup>31</sup> Plaintiffs claim that in the months that followed, FirstEnergy paid over \$7

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<sup>22</sup> Consolidated Complaint, ¶ 62.

<sup>23</sup> Consolidated Complaint, ¶ 44.

<sup>24</sup> Consolidated Complaint, ¶ 5.

<sup>25</sup> Opinion & Order, p. 3; Consolidated Complaint, ¶ 65.

<sup>26</sup> Opinion & Order, p. 3; Consolidated Complaint, ¶ 65.

<sup>27</sup> Consolidated Complaint, ¶ 70.

<sup>28</sup> Consolidated Complaint, ¶¶ 64, 67.

<sup>29</sup> Consolidated Complaint, ¶¶ 67-70.

<sup>30</sup> Consolidated Complaint, ¶ 73.

<sup>31</sup> Consolidated Complaint, ¶ 74.



million for support in the Ohio Senate, where it was amended to be more lucrative to FirstEnergy.<sup>32</sup> On July 23, 2019, the amended version of HB6 passed, and Ohio's governor signed it into law the same day.<sup>33</sup>

25. I understand that a referendum movement to repeal HB6 began following its passage.<sup>34</sup> FirstEnergy allegedly concealed payments of over \$38 million during the Class Period to defeat the repeal.<sup>35</sup> The repeal effort ultimately failed to meet an October 21, 2019 deadline to obtain enough signatures to appear on the ballot.<sup>36</sup>

### 3) Investigation into FirstEnergy and Aftermath

26. On July 21, 2020, the U.S. Attorney's Office for the Southern District of Ohio and the Federal Bureau of Investigation ("FBI") announced the arrests of Mr. Householder and several accomplices, and publicly filed a criminal complaint which described how FirstEnergy and its top executives illegally funneled \$60 million into the hands of politicians to get HB6 passed into law and avoid its repeal.<sup>37</sup> After close of business on July 21, 2020, FirstEnergy issued a statement announcing that it had received subpoenas in connection with the government's investigation into HB6.<sup>38</sup> The Consolidated Complaint describes news coverage and downgrades by stock analysts following these announcements.<sup>39</sup>

27. On July 21, 2020, the day after these disclosures, FirstEnergy's closing share price declined from \$41.26 the previous day to \$34.25, a decline of \$7.01 per share (17.0 percent decline).<sup>40</sup> The following day, FirstEnergy's share price continued to decline, closing at \$27.09, a two-day decline of \$14.17 (34.3 percent decline).<sup>41</sup>

28. I understand Plaintiffs allege that other disclosures followed, including on October 29, 2020, when FirstEnergy announced that it had terminated its Chief Executive Officer, Charles Jones, and other executives, stating that:

Such former members of senior management did not maintain and promote a control environment with an appropriate tone of compliance in certain areas of FirstEnergy's

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<sup>32</sup> Consolidated Complaint, ¶ 75 (emphasis in original). According to the Consolidated Complaint, "decoupling" measures for regulated utilities are generally intended to promote environmental interests by paying utility companies to promote various energy-saving initiatives, breaking the utilities' incentive to increase profits by encouraging wasteful excess energy consumption. See Consolidated Complaint, ¶ 76. In the case of HB6, the amended bill added a "decoupling" provision that legally entitled FirstEnergy to additional revenue *without* standard mandates to require energy-saving initiatives and programs. "For FirstEnergy, it was money for nothing." See Consolidated Complaint, ¶ 77.

<sup>33</sup> Consolidated Complaint, ¶ 78.

<sup>34</sup> Consolidated Complaint, ¶ 81.

<sup>35</sup> Consolidated Complaint, ¶¶ 82-85.

<sup>36</sup> Consolidated Complaint, ¶¶ 86.

<sup>37</sup> Consolidated Complaint, ¶ 8. According to the court, although the criminal complaint did not mention FirstEnergy by name, prosecutors announced that "[e]veryone in this room knows who [the company discussed in the complaint] is." See Opinion and Order, p. 5.

<sup>38</sup> Consolidated Complaint, ¶ 144; "FirstEnergy Corp. Statement on HB 6 Investigation," *PR Newswire*, Jul. 21, 2020.

<sup>39</sup> Consolidated Complaint, ¶¶ 145-147

<sup>40</sup> Bloomberg data.

<sup>41</sup> Bloomberg data.

business, nor sufficiently promote, monitor or enforce adherence to certain FirstEnergy policies and its code of conduct. Furthermore, certain former members of senior management did not reasonably ensure that relevant information was communicated within our organization and not withheld from our independent directors, our Audit Committee, and our independent auditor.<sup>42</sup>

29. Following this announcement, FirstEnergy common stock fell 6.6 percent from a closing price of \$31.81 on October 29, 2020 to a closing price of \$29.72 on October 30, 2020.<sup>43</sup>

30. Among the other alleged disclosures, on November 19, 2020, I understand the WFMJ website posted a story which reported that Public Utilities Commission of Ohio (“PUCO”) Chairman Samuel Randazzo was the recipient of a \$4 million illicit payment from FirstEnergy.<sup>44</sup> On November 20, 2020, I understand Mr. Randazzo announced his resignation as PUCO chairman,<sup>45</sup> and bond rating agency Fitch announced it was downgrading the ratings of FirstEnergy and FirstEnergy Transmissions LLC due to the “regulatory, political, legal and liquidity risks already heightened by investigations underway at the Department of Justice (DOJ) and [Securities and Exchange Commission (“SEC”)].”<sup>46</sup>

31. On November 24, 2020, FirstEnergy announced that it and its subsidiary, FirstEnergy Transmission, LLC, had drawn down nearly \$2 billion under their respective credit facilities, which according to Plaintiffs, was widely viewed as preparation for a large fine or penalty.<sup>47</sup> On the news, Moody’s and S&P ratings agencies downgraded FirstEnergy’s debt to below investment grade status.<sup>48</sup> Moody’s noted at the time that:

The disclosure of a payment by FirstEnergy to a government official who directly regulated the company’s Ohio utilities is likely to increase both regulatory risk and financial uncertainty for both FirstEnergy and its Ohio utility subsidiaries...

The rating actions reflect our view that regulatory scrutiny in Ohio is likely to increase, potentially resulting [in] negative financial implications for both FirstEnergy and its Ohio utility subsidiaries. The rating actions reflect higher corporate governance risk, resulting from FirstEnergy’s lack of oversight of internal controls...<sup>49</sup>

32. Between November 19, 2020 and November 24, 2020, the closing price of FirstEnergy declined from \$29.04 to \$26.66, an 8.2 percent decline.<sup>50</sup>

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<sup>42</sup> Consolidated Complaint, ¶ 190.

<sup>43</sup> Bloomberg data.

<sup>44</sup> Consolidated Complaint, ¶ 193.

<sup>45</sup> Consolidated Complaint, ¶ 194.

<sup>46</sup> Consolidated Complaint, ¶ 194.

<sup>47</sup> Consolidated Complaint, ¶ 196.

<sup>48</sup> Consolidated Complaint, ¶ 197-199; “Moody’s downgrades FirstEnergy to Ba1, assigns Ba1 CFR, outlook negative; changes outlooks of Ohio utilities and FirstEnergy Transmission to negative,” *Moody’s Investors Service*, Nov. 24, 2020.

<sup>49</sup> Consolidated Complaint, ¶ 197; “Moody’s downgrades FirstEnergy to Ba1, assigns Ba1 CFR, outlook negative; changes outlooks of Ohio utilities and FirstEnergy Transmission to negative,” *Moody’s Investors Service*, Nov. 24, 2020.

<sup>50</sup> Bloomberg data.

#### 4) Summary

33. I understand the Consolidated Complaint sets forth five counts against the Defendants in this matter:

- a. Count I for violation of Section 10(b) of the Exchange Act and SEC Rule 10b-5, against the Exchange Act Defendants;<sup>51</sup>
- b. Count II for violation of Section 20(a) of the Exchange Act, against the Exchange Act Defendants;<sup>52</sup>
- c. Count III for violation of Section 11 of the Securities Act against the Securities Act Defendants;<sup>53</sup>
- d. Count IV for violation of Section 12(a)(2) of the Securities Act against the Securities Act Defendants;<sup>54</sup> and
- e. Count V for violation of Section 15 of the Securities Act, against FirstEnergy and the Individual Defendants.<sup>55</sup>

34. In denying the Defendants' motions to dismiss, the Court noted that FirstEnergy "allegedly misled its shareholders about the nature of its political activity," citing the example of the company's Political Activity Policy that stated that the company "complies with all federal and state lobbying registration and disclosure requirements."<sup>56</sup> It also noted that "[w]hen the Court accepts Plaintiffs' well-pled scheme liability claims, Defendants' '[a]spirational statements' and '[g]eneric statements of legal compliance' would be less than a full and fair disclosure of the facts actually known to the Company."<sup>57</sup>

35. The Court also noted that FirstEnergy's SEC filings disclosed the company's pursuit of "[l]egislative or regulatory solutions" without mentioning the legal, financial or reputational risks involved in their pursuit.<sup>58</sup> According to the Court, multiple Defendants' statements about HB6 allegedly misrepresented the law as beneficial to FirstEnergy rather than harmful because of the risks to the company associated with the alleged bribery and corruption scheme: "[i]f HB6 was the ill-gotten gain of an intentional corrupt scheme, then Defendants had no honest basis to hail the benefits of the legislation; on net, it was a grave risk to the Company."<sup>59</sup>

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<sup>51</sup> Consolidated Complaint, ¶¶ 268-271.

<sup>52</sup> Consolidated Complaint, ¶¶ 272-275.

<sup>53</sup> Consolidated Complaint, ¶¶ 302-309.

<sup>54</sup> Consolidated Complaint, ¶¶ 310-317.

<sup>55</sup> Consolidated Complaint, ¶¶ 318-322.

<sup>56</sup> Opinion & Order, pp. 3-4.

<sup>57</sup> Opinion & Order, p. 20 (citations omitted).

<sup>58</sup> Opinion & Order, p. 4.

<sup>59</sup> Opinion & Order, p. 19. See *also*, Opinion & Order, pp. 20-23.

## VI. Assessment of Market Efficiency

36. It is my understanding that, in order to invoke the “fraud on the market” presumption of reliance, courts have required (among other things) that the plaintiff establish that the security was traded in an efficient market during the relevant period.<sup>60</sup>

37. It is widely accepted that prices of shares traded on major exchanges such as the New York Stock Exchange respond to new value-relevant information; that is, such markets are informationally efficient with respect to publicly available information. As prominent academics have noted, “economists generally agree that material information—whether truthful or fraudulent—will generally affect the price of a stock and that the effect will be in a predictable direction.”<sup>61</sup>

38. According to the efficient market hypothesis (“EMH”), in an efficient market, the price of an investment reflects all available information in the market. The economic literature identifies three forms of the EMH:<sup>62</sup>

- a. The weak form suggests that all information contained in past prices is incorporated in the current price of a traded asset;
- b. The semi-strong form of the EMH states that all publicly available information is reflected in the price of a traded asset;
- c. The strong form of market efficiency suggests that all public and private information is incorporated in the price of a traded asset.

39. A finding that shares trade in a semi-strong-form efficient market indicates that the prices of those shares incorporate new, value-relevant public information about the issuer.<sup>63</sup> Consistent with this principle, I understand that courts have considered evidence that a security traded in a market characterized by the semi-strong form of the EMH as a basis to invoke the “fraud on the market” presumption with respect to that security in the context of securities litigation.<sup>64</sup>

40. Practitioners and courts have found that shares of large companies traded on major exchanges generally trade in semi-strong form efficient markets.<sup>65</sup> Throughout the Class Period, FirstEnergy traded on the New York Stock Exchange, self-described as “the world’s largest stock exchange.”<sup>66</sup> Throughout

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<sup>60</sup> *Basic Inc. v. Levinson*, 485 U.S. 224, 245-46 (1988) (“Basic”); *Halliburton Co. v. Erica P. John Fund, Inc.*, 573 U.S. 258, 277-78 (2014) (“Halliburton II”).

<sup>61</sup> Brief of Financial Economists as Amici Curiae in Support of Respondents, *Halliburton II*, 2014 WL 526436, at \*13-14 (U.S. Feb. 5, 2014).

<sup>62</sup> Eugene F. Fama, “Efficient Capital Markets: A Review of Theory and Empirical Work,” *The Journal of Finance*, 25(2), May, 1970; Papers and Proceedings of the Twenty-Eighth Annual Meeting of the American Finance Association New York, N.Y., Dec., 28-30, 1969, pp. 383-417. See also, John Campbell, et al., *The Econometrics of Financial Markets* (1997), p. 22.

<sup>63</sup> For the purposes of this discussion, general references to market efficiency refer to the semi-strong form unless otherwise noted.

<sup>64</sup> *Basic*, 485 U.S. at 245-46; John Campbell, et al., *The Econometrics of Financial Markets* (1997), p. 22.

<sup>65</sup> See, e.g., *Freeman v. Laventhol & Horwath*, 915 F.2d 193, 199 (6th Cir. 1990); Brief of Testifying Economists as Amici Curiae in Support of Respondent, *Halliburton II*, 2014 WL 507164, at \*7-8 (U.S. Feb. 5, 2014).

<sup>66</sup> NYSE, <https://www.nyse.com/index>.

the Class Period, FirstEnergy was a part of the S&P 500, Russell 1000, and S&P 1500 indices.<sup>67</sup> Inclusion in such indices is based on a firm's shares meeting certain criteria with regard to market capitalization, public float, liquidity, and "reasonable" prices, similar to those typically used to evaluate whether a stock trades in semi-strong form efficient markets.<sup>68</sup>

41. I understand that courts regularly consider the five factors set forth in *Cammer v. Bloom* in assessing market efficiency.<sup>69</sup> These five factors are:

- a. average weekly trading volume relative to outstanding shares;
- b. number of analysts following the stock;
- c. market maker and arbitrage activity;
- d. ability to issue new securities through an S-3 registration statement; and
- e. empirical facts showing a cause-and-effect relation between unexpected corporate events or financial releases and stock price movement.

42. In addition to the factors outlined in *Cammer*, I understand that courts have considered additional factors relevant in demonstrating the efficiency of a market for stock, including:

- a. market capitalization and float;<sup>70</sup>
- b. bid-ask spread;<sup>71</sup>
- c. presence of autocorrelation in stock price returns;<sup>72</sup> and
- d. constraints on short selling.<sup>73</sup>

43. Each of these factors is considered below.

## A. *Cammer* Factors

### 1) *Cammer* Factor 1: Average Weekly Trading Volume

44. In *Cammer*, the court observed that an actively traded security is indicative of market efficiency "because it implies significant investor interest in the company," which, "in turn, implies a likelihood that

<sup>67</sup> Bloomberg data.

<sup>68</sup> "S&P 500 Factsheet," *S&P Dow Jones Indices*, as of Mar. 31, 2022; "Index factsheet: Russell 1000 Index," *FTSE Russell*, as of Nov. 30, 2021; "S&P Composite 1500 Factsheet," *S&P Dow Jones Indices*, as of Mar. 31, 2022.

<sup>69</sup> *Cammer v. Bloom* ("*Cammer*"), 711 F. Supp. 1264 (D.N.J. 1989).

<sup>70</sup> *Krogman v. Sterritt* ("*Krogman*"), 202 F.R.D. 467, 477-78 (N.D. Tex. 2001); *Freeman v. Laventhol & Horwath*, 915 F.2d 193, 199 (6th Cir. 1990).

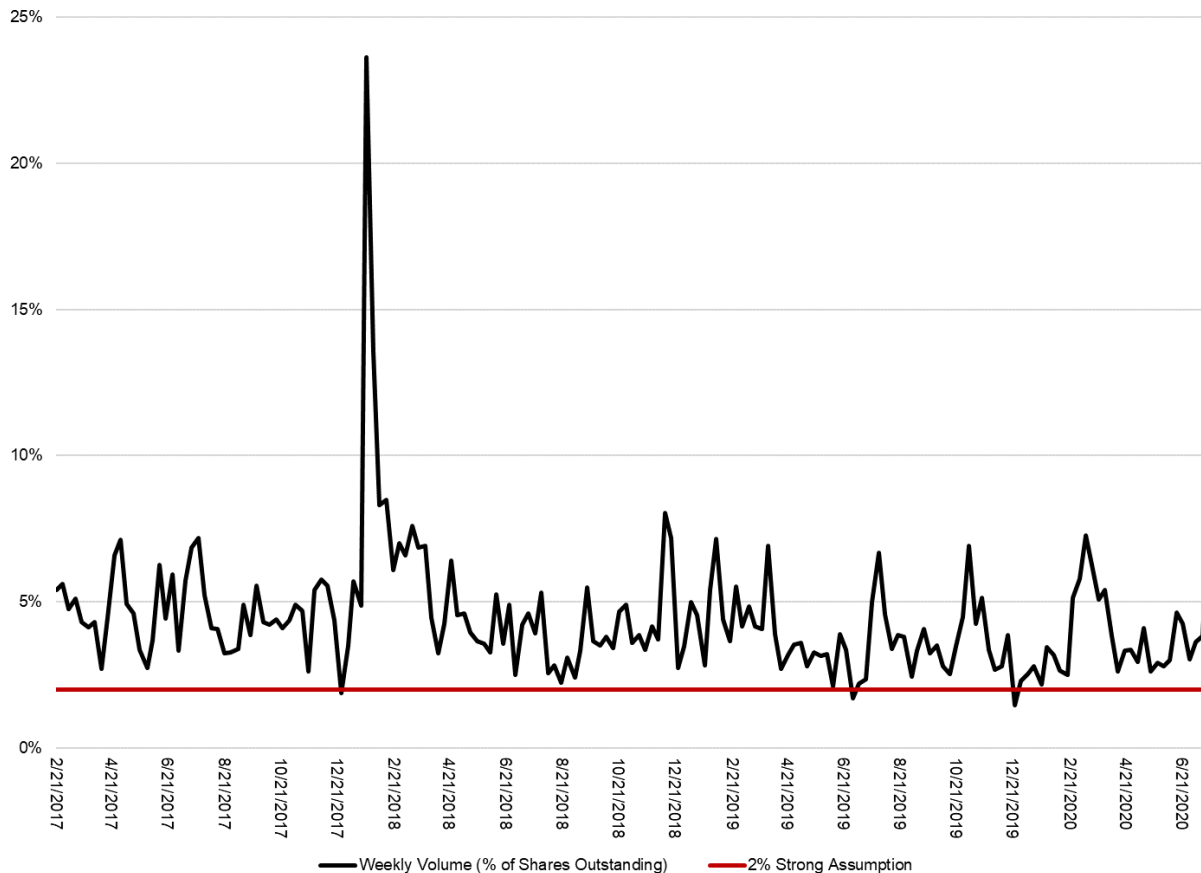
<sup>71</sup> *Krogman*, 202 F.R.D. 467, 477-78 (N.D. Tex. 2001); *Unger v. Amedys Inc* ("*Unger*"), 401 F.3d 316, 323 (5th Cir. 2005).

<sup>72</sup> *In re DVI Inc. Sec. Litig.*, 249 F.R.D. 196 (E.D. Pa. 2008).

<sup>73</sup> *Carpenters Pension Tr. Fund of St. Louis v. Barclays PLC*, 310 F.R.D. 69, 81 n.77 (S.D.N.Y. 2015).

many investors are executing trades on the basis of newly available or disseminated corporate information.”<sup>74</sup> The court identified weekly turnover (average weekly trading volume relative to the shares outstanding) as a relevant indicator of active trading, concluding that “[t]urnover measured by average weekly trading of two percent or more of the outstanding shares would justify a strong presumption that the market for the security is an efficient one; one percent would justify a substantial presumption.”<sup>75</sup> The following chart shows weekly turnover in FE stock throughout the Class Period.

**Chart 1. FE Weekly Stock Turnover<sup>76</sup>**



45. Weekly turnover (expressed in terms of shares outstanding) averaged 4.4 percent per week (on average, 21.7 million shares traded out of an average of 496.4 million shares outstanding) throughout

<sup>74</sup> *Cammer*, 711 F. Supp. at 1286.

<sup>75</sup> *Cammer*, 711 F. Supp. at 1286 (citing Bromberg, Alan R. & Lowenfels, Lewis D., 4 *Securities Fraud and Commodities Fraud*, § 8.6 (Aug. 1988) (“*Bromberg*”).

<sup>76</sup> Weekly trading volume and total shares outstanding for FE as reported by Bloomberg and S&P Capital IQ. I note that the spike in trading volume on January 22, 2018 appears to relate to FirstEnergy’s issuance of \$1.62 billion in mandatorily convertible preferred shares and \$850 million in common stock on that day. See Consolidated Complaint, ¶ 242; “FirstEnergy Announces Transformational \$2.5 Billion Equity Investment,” *PR Newswire*, Jan. 22, 2018.

the Class Period, exceeding the 2 percent threshold for a strong presumption of efficiency.<sup>77</sup> These facts support an inference of an efficient market for FE common stock throughout the Class Period.

## 2) *Cammer* Factor 2: Analyst Coverage

46. Widespread dissemination and discussion of company developments facilitates the incorporation of information into stock prices. *Cammer* stated that a “significant” number of securities analysts following a stock would be indicative of market efficiency, because “[t]he existence of such analysts would imply, for example, [relevant financial reports] were closely reviewed by investment professionals, who would in turn make buy/sell recommendations to client investors.”<sup>78</sup>

47. Securities analysts from major financial institutions who follow FirstEnergy make buy and sell recommendations about FirstEnergy to their investors on a regular basis. Bloomberg, L.P. (“*Bloomberg*”) reports the number of such analyst recommendations, which I have compiled over the Class Period.<sup>79</sup> Bloomberg compiled buy/sell recommendations on FirstEnergy stock for at least 18 analysts in each month of the Class Period, with an average of 19.9 analysts per month during the Class Period.

48. I identified over 450 individual analyst reports discussing FirstEnergy during the Class Period. These reports include detailed analyses of FirstEnergy’s business and operations from analysts at major financial institutions including Deutsche Bank, Credit Suisse, UBS, JPMorgan, Barclays, Bank of America Merrill Lynch, RBC Capital Markets, and Morningstar.<sup>80</sup> In addition to supporting analysts’ buy/sell recommendations and price targets for FirstEnergy, these reports also reflected analysts’ responses, from both a quantitative and qualitative perspective, to new, value-relevant information.

49. I also identified over 1,000 reports from financial media, wire services, and general media discussing FirstEnergy during the Class Period in publications including the *Wall Street Journal*, *Crain’s Cleveland Business*, the *Plain Dealer*, and the *Akron Beacon-Journal*.<sup>81</sup> These reports included discussion and dissemination of value-relevant information regarding FirstEnergy’s strategy, acquisitions, financial disclosures, and other events, making such information widely distributed to general audiences. This news media coverage facilitated the flow of information to the market related to FirstEnergy, thereby promoting market efficiency.

50. The breadth and depth of analyst and media coverage during the Class Period demonstrates that newly available, value-relevant financial information was actively monitored and scrutinized by a network of investment professionals and media outlets, who quickly digested new information and

<sup>77</sup> Average daily volume during the Class Period was approximately 4.5 million shares.

<sup>78</sup> *Cammer*, 711 F. Supp 1264 (D.N.J. 1989), at 1286.

<sup>79</sup> Total analyst recommendations for FE as of the last trading day of each quarter as reported in Bloomberg.

<sup>80</sup> See [Appendix B](#). I understand analyst reports were accessed through Thomson Reuters.

<sup>81</sup> See [Appendix B](#). I understand media reports were accessed through LexisNexis.



disseminated the information to FirstEnergy investors. Such coverage supports the proposition that FirstEnergy's shares traded in an efficient market.

### 3) *Cammer* Factor 3: Existence of Market Makers/Institutional Investors and Arbitrageurs

51. The court in *Cammer* found that “[t]he existence of market makers and arbitrageurs would ensure completion of the market mechanism; these individuals would react swiftly to company news and reported financial results by buying or selling stock and driving it to a changed price level.”<sup>82</sup>

52. The SEC defines a market maker as “a firm that stands ready to buy and sell a particular stock on a regular and continuous basis at a publicly quoted price.”<sup>83</sup> Market makers hold shares of securities to fill buy or sell orders on demand, thereby offering investors liquidity. The presence of market makers ensures that buyers and sellers of a stock have a ready counterparty available for the “completion of the market mechanism” as new value-relevant information becomes available.<sup>84</sup>

53. At least 11 financial institutions disclose they made a market in FirstEnergy common stock during the Class Period.<sup>85</sup> Furthermore, throughout the Class Period, FE was listed on the NYSE, which allocates a designated market maker (“DMM”) to each listed security.<sup>86</sup> According to the NYSE:

The cornerstone of the NYSE market model is the Designated Market Maker (DMM). DMMs have obligations to maintain fair and orderly markets for their assigned securities. They operate both manually and electronically to facilitate price discovery during market opens, closes and during periods of trading imbalances or instability. This high-touch approach is crucial for offering the best prices, dampening volatility, adding liquidity and enhancing value.

DMMs apply their market experience and judgment of dynamic trading conditions, macroeconomic news and industry-specific intelligence, to inform their decisions. A valuable resource for our listed-company community, DMMs offer insights, while making capital commitments, maintaining market integrity, and supporting price discovery.<sup>87</sup>

54. DMMs are subject to various responsibilities and duties which compel them to maintain an orderly market and provide liquidity for covered securities.<sup>88</sup> DMMs are also subject to financial

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<sup>82</sup> *Cammer*, 711 F. Supp. at 1286-87.

<sup>83</sup> “Fast Answers: Market Maker,” SEC, <https://www.sec.gov/fast-answers/answersmktmakerhtm.html>.

<sup>84</sup> *Cammer*, 711 F. Supp. at 1286-87; “Fast Answers: Market Maker,” <https://www.sec.gov/fast-answers/answersmktmakerhtm.html>.

<sup>85</sup> **Exhibit 1.** See, for example, Morgan Stanley, “Ohio Investigation: FE Subpoena Increases Prospects for More Bearish Performance,” Jul. 22, 2020; Wells Fargo, “FE: OH Lobbying-Related Arrests Inject Uncertainty-- We Think Share Reaction Overdone,” Jul. 21, 2020; Deutsche Bank, “Buckeye growth surprise,” Feb. 21, 2018; J.P. Morgan, “Still Not Seeing Value Even After Equity Raise,” Feb. 15, 2018.

<sup>86</sup> NYSE Rule 106.02, <https://nyseguide.srourules.com/listed-company-manual>. See also, “The NYSE Market Model,” <https://www.nyse.com/market-model>.

<sup>87</sup> “The NYSE Market Model,” NYSE, <https://www.nyse.com/market-model>.

<sup>88</sup> See NYSE Rule 104(a), <https://nyseguide.srourules.com/rules>.



requirements, which provide assurance of their ability to function on a continuous basis.<sup>89</sup> In addition, I understand DMMs must meet certain trading obligations that serve to increase liquidity, reduce volatility, improve price discovery, and reduce trading costs for FE investors.<sup>90</sup>

55. The presence of market makers ensures that buyers and sellers were able to routinely exchange shares at market-clearing prices, which ensures prices are reflective of information known by market participants. Throughout the Class Period, multiple large financial institutions made a market for FE's common stock.<sup>91</sup>

56. *Cammer* also points to the presence of arbitrageurs, who "react swiftly to company news and reported financial results," as another indication of market efficiency.<sup>92</sup> Arbitrageurs maintain market efficiency by identifying opportunities to buy/sell securities that are under/over-priced. This ensures prevailing prices reflect available value-relevant information.

57. One way to measure the extent to which a security is owned by the type of well-informed investors that typically act as arbitrageurs is to examine the percentage of shares owned by institutional investors such as mutual funds or money managers. Institutional investors or the investment advisors they rely on are presumed to be generally well-informed about the securities markets and have the capital, information, and resources required to take advantage of even relatively small arbitrage opportunities, ensuring that share prices reflect value-relevant information.<sup>93</sup>

58. During the Class Period, more than 1,400 institutions reported holdings in FirstEnergy and institutional investors owned at least 79 percent of FirstEnergy's public float.<sup>94</sup> This is broadly consistent with the level of institutional ownership of stocks included in major indices such as the S&P 500.<sup>95</sup> This suggests that FirstEnergy's stock was primarily held by sophisticated, well-informed investors who were in a position to consider and react to new, value-relevant information during the Class Period.

59. The level of institutional ownership of FirstEnergy stock, coupled with the participation of multiple market makers and the fact that FirstEnergy traded on the New York Stock Exchange, indicates that FirstEnergy traded in an efficient market.

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<sup>89</sup> See NYSE Rule 103, <https://nyseguide.srorules.com/rules>.

<sup>90</sup> "Designated Market Makers," NYSE, [https://www.nyse.com/publicdocs/nyse/markets/nyse/designated\\_market\\_makers.pdf](https://www.nyse.com/publicdocs/nyse/markets/nyse/designated_market_makers.pdf).

<sup>91</sup> The NYSE lists, for instance, Citadel Securities LLC, GTS Securities LLC, and Virtu Americas LLC as its DMMs. See, "Trading Information," NYSE, <https://www.nyse.com/markets/nyse/trading-info>.

<sup>92</sup> *Cammer*, 711 F. Supp. at 1286-87.

<sup>93</sup> Brad M. Barber, et al., "The Fraud-on-the-Market Theory and the Indicators of Common Stocks' Efficiency," *The Journal of Corporation Law*, Winter 1994, p. 292.

<sup>94</sup> S&P Capital IQ Data and SEC Filings. I note that S&P Capital IQ lists FE's institutional ownership as over 100% of public float for one quarter during the Class Period. I understand that this is due to timing discrepancies in SEC Form 13F filings (from which this data is gathered), institutional lending of shares, and other technical issues. Despite these discrepancies, this data is properly read as a directional indication that a significant portion of FE shares are owned by institutional investors.

<sup>95</sup> See, e.g., Charles McGrath, "80% of equity market cap held by institutions," *Pensions & Investments*, Apr. 25, 2017; "S&P Global," *CNN Business*, <https://money.cnn.com/quote/shareholders/shareholders.html?symb=SPGI&subView=institutional>.

#### 4) *Cammer* Factor 4: Eligibility to File an S-3 Registration Statement

60. The SEC allows “more seasoned” companies to file a Form S-3 to register securities.<sup>96</sup> The court in *Cammer* found “the existence of Form S-3 status is an important factor weighing in favor of a finding that a market is efficient” as “it is the largest and most well known companies which register equity securities on Form S-3.”<sup>97</sup>

61. The Form S-3 provides for an expedited registration of public securities by a company that already has registered a class of securities under the Exchange Act and which has been in compliance with the reporting requirements under the Exchange Act without defaulting on debts during the previous year.<sup>98</sup> A company is eligible to register an equity offering with an expedited Form S-3 when its common equity held by non-affiliates (its “public float”) is worth at least \$75 million.<sup>99</sup> According to *Cammer*, “[t]he ‘public float’ aspect of the Form S-3 requirements ensures that enough investors have in fact read the previously filed [prospectus]. . . . It is this aspect of the Form S-3 requirements that calls into play the efficient market hypothesis.”<sup>100</sup>

62. Due to its history as a public stock, FirstEnergy had already been subject to the Securities Exchange Act reporting requirements for at least twelve calendar months by the beginning of the Class Period, as is required for companies to be eligible to file a Form S-3.<sup>101</sup> In addition, FirstEnergy had three S-3 registrations during the Class Period, which is further evidence that its shares traded in an efficient market.<sup>102</sup>

63. Furthermore, I understand that throughout the Class Period FirstEnergy traded on the New York Stock Exchange and met the principal requirements to file a Form S-3: it had sufficient public float and I have seen no evidence that it had defaulted on its debt or failed to file any required reports with the SEC.

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<sup>96</sup> *Cammer*, 711 F. Supp. at 1284.

<sup>97</sup> “As stated by the SEC: . . . Proposed Form S-3 recognizes the applicability of the efficient market theory to the registration statement framework with respect to those registrants which usually provide high quality corporate reports, including Exchange Act reports, and whose corporate information is broadly disseminated, because such companies are widely followed by professional analysts and investors in the market place. . . . Because of the foregoing observations made by the SEC, the existence of Form S-3 status is an important factor weighing in favor of a finding that a market is efficient.” *Cammer*, 711 F. Supp. at 1284-85. See also, *Krogman*, 202 F.R.D. at 476 (finding that the SEC permits the filing of a Form S-3 “only on the premise that the stock is already traded on an open and efficient market, such that further disclosure is unnecessary”).

<sup>98</sup> Form S-3 Registration Statement Under the Securities Act of 1933, pp. 2-3, <https://www.sec.gov/files/forms-3.pdf>.

<sup>99</sup> Alternatively, companies that do not have a public float of at least \$75 million can file an S-3 if they meet all other S-3 requirements, are not a shell company, have their stock listed and registered on a national securities exchange, and limit their offerings to no more than 1/3 of the market value of stock held by non-affiliates. See *id.*, pp. 3, 5.

<sup>100</sup> *Cammer*, 711 F. Supp. at 1285 & n. 33.

<sup>101</sup> Form S-3 Registration Statement Under the Securities Act of 1933, p. 2, <https://www.sec.gov/files/forms-3.pdf>.

<sup>102</sup> See FirstEnergy Corp. Forms S-3, dated March 6, 2018, March 7, 2018, and August 16, 2019.

**5) *Cammer* Factor 5: Empirical Evidence of Cause-and-Effect Relationship Between Events and Stock Price Movements**

64. The fifth *Cammer* factor relates to a cause-and-effect relationship between the release of unexpected company news and stock price movements. As the court explained:

[I]t would be helpful to a plaintiff seeking to allege an efficient market to allege empirical facts showing a cause and effect relationship between unexpected corporate events or financial releases and an immediate response in the stock price. This, after all, is the essence of an efficient market and the foundation for the fraud on the market theory.<sup>103</sup>

65. The fifth *Cammer* factor implies that on days when new information that is relevant to the value of a company whose stock trades in an efficient market becomes available, price movements (both positive and negative) tend to be larger than price movements on days without such information.<sup>104</sup> Since information has the potential to change expectations about a company and, therefore, the value of its shares, on average one would expect days on which new information was released to be associated with a relatively higher frequency of significant abnormal returns in an efficient market in which shares react to new information.

**a) Release Days**

66. In order to analyze the fifth *Cammer* factor with regard to FirstEnergy, I identify a subset of days on which FirstEnergy released value-relevant information through earnings announcements or changes to dividends ("Release Days"). The Release Days are therefore days on which one would expect value-relevant (though not necessarily unexpected) information to have become available to the market. I compare the frequency of statistically significant abnormal returns on Release Days (the treatment group) to that of other days in the Class Period (the control group) to test whether Release Days tended to be accompanied by significant changes in FirstEnergy's share price.

67. For the purpose of this analysis, I consider Release Days to be days on which FirstEnergy issued quarterly/annual financial results or announced a change to its quarterly dividend, which is a set of days that one would expect, *ex ante*, to be value-relevant.<sup>105</sup> Academic articles and treatises explain

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<sup>103</sup> *Cammer*, 711 F. Supp. at 1287.

<sup>104</sup> An abnormal price movement on all days when information is released is not necessary for a finding of market efficiency because information included in certain releases may have been small relative to the size of the firm or expected by market participants.

<sup>105</sup> Limiting my Release Days to earnings releases and dividend changes does not mean that there are no other days within the Class Period on which new, value-relevant information was released. By its nature, the selection of a limited number of Release Days when news was released, if anything, biases my results toward a finding of no cause-and-effect relationship (as my Release Days exclude additional days on which value-relevant information may have become available, thereby decreasing the likelihood of observing a difference in the frequency of statistically significant abnormal returns across Release days and others). By only considering earnings releases and dividend changes, therefore, I ensure that the manner in which I identified Release Days is consistent with the principles of economic hypothesis testing and was performed using a replicable process.

theoretically and demonstrate empirically that information disclosed in conjunction with earnings announcements can cause investors to significantly reevaluate the worth of a particular security.<sup>106</sup>

68. I identified 16 Release Days during the Class Period, each of which is associated with an earnings release or change in dividend by FirstEnergy. The earnings information included in each Release Day originated from FirstEnergy and was released to the public market via press release or public filing.<sup>107</sup>

## b) Event Study

69. In order to examine the extent to which FirstEnergy's share price responded to information disclosed on Release Days, I apply a widely accepted technique known as an event study.<sup>108</sup> Event studies examine share price returns corresponding to a particular *event window*, based on when the event in question occurred. An event study may be used to isolate the impact of an announcement corresponding to a particular event from other factors that would have affected the share price at that time, such as macroeconomic news affecting broad market indices.

70. A widely used application of the event study is known as the market model.<sup>109</sup> The market model is based on regression analysis, which provides a statistical framework for examining the nature and form of the relationship between two or more variables. In this case, a market model may be used to explain or predict changes in the dependent variable, in this case FirstEnergy's share price returns, as a function of changes in the values of the independent variables, such as returns to the overall U.S. stock market and a comparable index.

71. The market model works by predicting what the share price return would have been based on movements in market indices on a particular day.<sup>110</sup> By subtracting predicted returns from the actual returns, we can estimate the change in the company's share price that is not explained by wider market phenomena, which is known as the *abnormal return*. Thus, the abnormal return is the difference between the return predicted by the market model and the actual return associated with the event at issue. In cases where the abnormal return is statistically significant, it may be reasonable to conclude that it was caused

<sup>106</sup> See, e.g., William H. Beaver, "The Information Content of Annual Earnings Announcements," *Journal of Accounting Research* 6, 1968, pp. 67-92; William H. Beaver, *Financial Reporting: An Accounting Revolution* (3<sup>rd</sup> ed. 1998), p. 38 ("No other figure in the financial statements receives more attention by the investment community than earnings per share. The relationship between accounting earnings and security prices is probably the single most important relationship in security analysis, and its prominence is reflected in the attention given to price-earnings ratios."); Robert G. May, "The Influence of Quarterly Earnings Announcements on Investor Decisions as Reflected in Common Stock Price Changes," *Journal of Accounting Research* 9, 1971, pp. 119-163; Joseph Aharony and Itzhak Swary, "Quarterly Dividend and Earnings Announcements and Stockholders' Returns: An Empirical Analysis," *The Journal of Finance* 35(1), 1980, pp. 1-12.

<sup>107</sup> See [Exhibit 2](#).

<sup>108</sup> John Campbell, et al., *The Econometrics of Financial Markets* (1997), Chapter 4. See also, *Halliburton II*, 573 U.S. at 280-81.

<sup>109</sup> John Campbell, et al., *The Econometrics of Financial Markets* (1997), Chapters 4-6. See also, A. Craig MacKinlay, "Event Studies in Economics and Finance," *Journal of Economic Literature*, Vol. 35, No. 1, Mar. 1997.

<sup>110</sup> Share price returns are computed as the percentage movements in the security price. For the purposes of estimating the market model, share price returns are typically expressed as logarithmic returns, or log returns. Specifically, a log return is the natural logarithm of the ratio of two daily closing security prices:  $\ln(P_t/P_{t-1})$ , where 'ln' is the natural logarithm, 'P' refers to the security price on day *t* and 'P<sub>t-1</sub>' refers to the security price one trading day prior to day *t*.

by the event in question, provided the news became available to the market at the time of (or just prior to) the abnormal movement.<sup>111</sup>

72. The market model can control for broad market movements as well as industry-specific information that is not specific to the company. In addition, market models may also include indicator variables to control for other events, such as earnings announcements, that one would expect to affect share price returns on days outside the event window.

73. I apply a market model to estimate FirstEnergy abnormal returns for the Class Period using the following independent variables:<sup>112</sup>

- a. An independent variable representing the daily log return of the S&P 500 Total Return Index (the "Market Index"), calculated as the natural logarithm of the ratio of its consecutive daily closing prices, or  $\ln(P(MRKT)_t/P(MRKT)_{t-1})$ .<sup>113</sup>
- b. An independent variable representing the daily log return of the S&P 500 Utilities Sector GICS Level 1 Index (the "Industry Index"), calculated as the natural logarithm of the ratio of its consecutive daily closing prices, or  $\ln(P(IND)_t/P(IND)_{t-1})$ .<sup>114</sup>
- c. Indicator, or dummy, variables that have a value of one on Release Days and zero on all other days.

74. I use the market model to predict FirstEnergy's expected share price return on each day of the Class Period using a set number of other days' returns, or *estimation window*. For each trading day in the Class Period, I use an estimation window consisting of all trading days in the Class Period other than the one predicted. This ensures that FirstEnergy's operational structure is consistent during my estimation window and the Release Days.<sup>115</sup>

75. I then compare the frequency of statistically significant abnormal returns on the Release Days to abnormal returns on all other trading days during the Class Period.

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<sup>111</sup> Statistical significance represents the likelihood that a result or observed relationship between two variables is unlikely under a specific hypothesis. Hypothesis testing is traditionally employed to determine if a result is statistically significant or not. This provides a "p-value" representing the probability of observing data as extreme as that which was measured if the null hypothesis is indeed true. A statistically significant result at the one percent significance level is one in which there is a less than one percent probability of observing this data if the null hypothesis were true. Such p-values are also often described in terms of confidence levels by subtracting the p-value from 100 percent. See, for instance, Jeffrey M. Wooldridge, *Introductory Econometrics: A Modern Approach* (6<sup>th</sup> ed. 2016), p. 119.

<sup>112</sup> As set forth in my reliance materials, the results of my analysis are not sensitive to the selection of a particular index. Applying alternative market and industry indices yields similar results.

<sup>113</sup> "S&P 500," *S&P Dow Jones Indices*, <https://www.spglobal.com/spdji/en/indices/equity/sp-500/#overview>.

<sup>114</sup> "S&P 500 Utilities," *S&P Dow Jones Indices*, <https://www.spglobal.com/spdji/en/indices/equity/sp-500-utilities-sector/#overview>.

<sup>115</sup> As set forth in my reliance materials, the results of my analysis are not sensitive to the estimation window.

**c) Analysis of Abnormal Returns**

76. The market model ensures that the abnormal return on any Release Day is indicative of a stock's reaction to new information, after controlling for returns that may be predicted from broader market movements. When statistically significant abnormal returns systematically follow the release of new information, one can infer that the value-relevant information is causing returns.<sup>116</sup>

77. When an event related to firm value (such as an information release) takes place on a specific day and the return following that event is significantly different from the prediction, it can be inferred that the stock price responded to the event or release of information on that day. If the return following such an event is statistically significant at some level (e.g., at the 5 or 10 percent level), then this implies that there is less than a 5 or 10 percent chance one would observe such an abnormal return under the null hypothesis that the market model fully explains FE's returns.<sup>117</sup>

78. I evaluate evidence of a cause-and-effect relationship between the release of value-relevant information and stock price movements by testing a hypothesis that the frequency of statistically significant abnormal returns differs between Release Days and other trading days. If FE trades in an efficient market, I expect a higher frequency of statistically significant abnormal returns on days in which news is released to the market relative to other trading days. I do not expect statistically significant returns to occur on all Release Days, since not all information released to the market is necessarily material or differs from expectations (e.g., market prices may already reflect the information if the event it was previously expected).

79. The set of Release Days that I identify in the Class Period provide sufficient statistical power from which to draw reliable inferences as to the responsiveness of FE stock to new, value-relevant information.

- a. I find a significantly higher frequency of statistically significant abnormal returns on Release Days compared to other days, with 5 of 16 days (approximately 31 percent) having abnormal returns that are significant at the 5 percent level (as well as the 10 percent level).<sup>118</sup>

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<sup>116</sup> The absence of a statistically significant abnormal return does not necessarily imply that a company's stock did not react to a particular set of information since, for instance, significant positive and negative news released at the same time can have offsetting effects, resulting in an abnormal return that is not statistically significant. Accordingly, although a statistically significant share price reaction to news is indicative of market efficiency, a finding of non-significance does not necessarily indicate that the market for a stock is inefficient, because a non-significant reaction may be expected depending on the circumstances.

<sup>117</sup> Although p-values of 0.05 and 0.10 are often applied as thresholds for statistical significance, the American Statistical Association ("ASA") has cautioned against relying on bright-line thresholds without considering the broader context of the analysis, explaining that "[p]ractices that reduce data analysis or scientific inference to mechanical 'bright-line' rules (such as 'p < 0.05') for justifying scientific claims or conclusions can lead to erroneous beliefs and poor decision making. A conclusion does not immediately become 'true' on one side of the divide and 'false' on the other." See, Ronald L. Wasserstein and Nicole A. Lazar, "The ASA Statement on p-Values: Context, Process, and Purpose," *The American Statistician*, 2016, 70:2, 129-133.

<sup>118</sup> See Exhibit 2. In addition, of the 14 Release Days corresponding to earnings announcements, 4 of 14 days (approximately 29 percent) have abnormal returns that are significant at the 5 percent level.



- b. In contrast, for the remaining 844 days in the Class Period, only 44 days (approximately 5 percent) have abnormal returns that are significant at the 5 percent level.

80. Chi-squared and Fisher's exact tests confirm the statistical significance of the difference in the frequency of significant abnormal returns on Release Days as compared to non-Release Days.<sup>119</sup>

81. My results are consistent with the hypothesis that there is a cause-and-effect relationship between information revealed on Release Days and FE's stock price movements. The results indicate that large abnormal returns are much more common on Release Days (when financial results were announced) than on non-Release Days, as would be expected in an efficient market.

#### **d) Conclusion**

82. My analysis of FirstEnergy's abnormal returns during the Class Period demonstrates that FirstEnergy's shares responded systematically to new information about the company, which directly supports a conclusion that FirstEnergy's common stock traded in an efficient market during the Class Period in a manner that can be considered as having arisen from a cause-and-effect relationship.

### **B. Krogman Factors**

83. In addition to those factors identified in *Cammer*, I understand courts have considered the three factors identified in *Krogman* when assessing market efficiency.<sup>120</sup>

#### **1) Market Capitalization and Public Float**

84. The first two *Krogman* factors are market capitalization and public float. The size of a stock's market capitalization and public float have been found to be indicators of market efficiency, as larger companies are more likely to be traded and a larger public float may represent greater trading opportunities for sophisticated investors.<sup>121</sup>

85. On every day throughout the Class Period, FirstEnergy's market capitalization exceeded \$12 billion with no less than 442 million shares outstanding on every trading day during the class period.<sup>122</sup> During the Class Period, FirstEnergy's public float was over 99 percent of total shares outstanding.<sup>123</sup>

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<sup>119</sup> Under both tests, the null hypothesis is that Release Days are *not* more likely than non-Release Days to have abnormally large price returns. The null hypothesis is rejected at the 1 percent significance level under both tests.

<sup>120</sup> *Krogman*, 202 F.R.D. 467, 477-78 (N.D. Tex. 2001).

<sup>121</sup> *Krogman*, 202 F.R.D. at 477-78; *Unger*, 401 F.3d at 323; *Cheney v. Cyberguard Corp.* ("*Cheney*"), 213 F.R.D. 484, 502 (S.D. Fla. 2003).

<sup>122</sup> FE historical market capitalization and shares outstanding as reported by Bloomberg and S&P Capital IQ. Market capitalization represents the market value of a company's issued and outstanding stock." See "Market Capitalization," *Investor.gov* (available at <https://www.investor.gov/introduction-investing/investing-basics/glossary/market-capitalization>).

<sup>123</sup> S&P Capital IQ.

86. FirstEnergy's market capitalization and public float throughout the Class Period is further evidence that FirstEnergy stock traded in an efficient market during the Class Period.

## 2) Bid-Ask Spread

87. The third *Krogman* factor, the bid-ask spread for a security, is the difference between the price that a buyer is willing to pay and the price that a seller is willing to accept.<sup>124</sup> Stocks trading at high volumes with multiple market makers tend to have many ready buyers and sellers, such that bid-ask spreads are smaller than those of more thinly traded stocks, which tend to have fewer market participants and larger bid-ask spreads.

88. Certain courts have established threshold values for bid-ask spreads that are deemed to weigh in favor of market efficiency. For instance, the court in *Cheney* found that a bid-ask spread of 2.44 percent weighed in favor of market efficiency.<sup>125</sup>

89. Bloomberg reports that the average bid-ask spread for FE stock for each trading day during the Class Period averaged 0.03 percent, well below the 2.44 percent spread found in *Cheney*.<sup>126</sup> FE's narrow bid-ask spread is consistent with evidence that its shares traded in an efficient market during the Class Period.

## C. Additional Indicators of Market Efficiency

90. In addition to the factors identified in *Cammer* and *Krogman*, I understand courts have considered other factors when assessing the efficiency of markets for stock.

### 1) Statistical Properties of Stock Returns (Autocorrelation)

91. Econometric techniques can be used to evaluate market efficiency by assessing whether lagged price returns are predictors of future price returns (*i.e.*, whether price returns are autocorrelated). If share price returns systematically predict returns on the next day, then investors could, in theory, profitably trade on past market data, implying that the market for that stock is not efficient.<sup>127</sup>

92. I first test for autocorrelation in FE returns by examining the relationship between each day's share price return and the return on the previous day using regression analysis. I find a statistically significant relationship, which could be indicative of autocorrelation.

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<sup>124</sup> "CFA Program Curriculum Level I Volume 5: Equity and Fixed Income, *CFA Institute* (2019), p. 44.

<sup>125</sup> *Cheney*, 213 F.R.D. at 501.

<sup>126</sup> FE bid-ask spread percent as reported by Bloomberg.

<sup>127</sup> See, e.g., John Campbell, et al., *The Econometrics of Financial Markets* (1997), at p. 22.



93. The Class Period in this matter includes the beginning of the COVID-19 pandemic, which corresponded to an increase in volatility in financial markets; for instance, the S&P 500 and Dow Jones Industrial Average indices lost roughly one third of their value in the five-week period from February 14 to March 20, 2020, and then rebounded in the spring and summer of 2020.<sup>128</sup> Limiting my autocorrelation analysis to the period from February 21, 2017 to January 31, 2020 (before the impact of COVID-19) eliminates the observed autocorrelation. More generally, I have seen no evidence that FE price returns could have been predicted from previous days' returns, which is consistent with a stock that traded in an efficient market.

94. When news released into the market affects the stock price unpredictably over time and in a non-systematic manner—that is, when returns respond to new information—the price series is said to have what is known as a “unit root.” The presence of a unit root in prices suggests that historical information does not have a persistent effect on returns.<sup>129</sup> The Augmented Dickey-Fuller test evaluates the presence of a “unit root” in a time-series.<sup>130</sup> Performing the Augmented Dickey-Fuller on FE stock price during the Class Period indicates that FE's price series has a unit root. These results are consistent with the evidence that FirstEnergy's stock traded in an efficient market.<sup>131</sup>

95. On balance, these tests do not provide evidence to indicate that lagged returns could be used to predict future returns. In addition, the direct evidence from the event study that FE responds to new value-relevant information is evidence that returns are not predictable from historical prices.

## 2) Lack of Constraints on Short Selling

96. I understand that the presence of short sellers is another factor that courts have considered as evidence of market efficiency.<sup>132</sup> Short sellers increase trading volumes and enhance the ability of a market to adjust for new information (e.g., as a check on share prices).

97. Constraints on short sellers, all else equal, would reduce market participation and potentially affect market efficiency. To assess whether short-selling constraints exist, regulatory agencies rely on certain factors, including “fails-to-deliver” in a short transaction. The SEC requires self-regulating

<sup>128</sup> Based on data from S&P Capital IQ.

<sup>129</sup> See, e.g., John Campbell, et al., *The Econometrics of Financial Markets*, (1997), p. 30.

<sup>130</sup> David Dickey and Wayne Fuller, “Distribution of the Estimators for Autoregressive Time Series with a Unit Root,” *Journal of the American Statistical Association*, Vol. 74, Issue 366, Jun. 1979, pp. 427-431; “Augmented Dickey-Fuller unit root test,” *Stata Time Series Reference Manual* (Release 15, 2017), p. 157.

<sup>131</sup> The Augmented Dickey Fuller test evaluates the presence of a unit root in a time-series. The null hypothesis being tested is that a unit root exists. In this case, the test suggests the presence of a unit root in FE's stock price *series* and rejects the premise a unit root exists in FE's stock price *returns*.

<sup>132</sup> See, e.g., *Schleicher v. Wendt*, 618 F.3d 679, 685 (7th Cir. 2010); *Barclays*, 310 F.R.D. at 81 n.77.

organizations (like the New York Stock Exchange) to maintain lists of “threshold securities” that may have heightened risk of short sale constraints.<sup>133</sup> A threshold security is one that meets the following criteria:

- a. there is an aggregate fail to deliver position at a registered clearing agency for five consecutive settlement days;<sup>134</sup>
- b. there are aggregate fails to deliver at a registered clearing agency of 10,000 shares or more per security;<sup>135</sup> and
- c. the level of fails is equal to at least one-half of one percent of the issuer’s total shares outstanding.<sup>136</sup>

98. The SEC tracks the total fails-to-deliver shares for each security. While some level of delivery failures is common, the SEC tracks securities with delivery failures exceeding one-half of one percent for more than five consecutive settlement dates.<sup>137</sup> The SEC also notes that securities designated as “threshold securities” tend to have higher fees.<sup>138</sup> High fees can also limit short selling by consuming profits and deterring investors who might otherwise engage in short transactions.

99. As shown in the chart below, FE was below the threshold established by the SEC on all trading days during the Class Period and I have seen no evidence that FE ever met the SEC definition of a threshold security at any time during that Class Period.

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<sup>133</sup> See, e.g., “NYSE Regulation Threshold Securities,” *Intercontinental Exchange*, <https://www.nyse.com/regulation/threshold-securities>; “Nasdaq Threshold List,” *Nasdaq Trader*, <https://www.nasdaqtrader.com/trader.aspx?id=RegSHOTthreshold>.

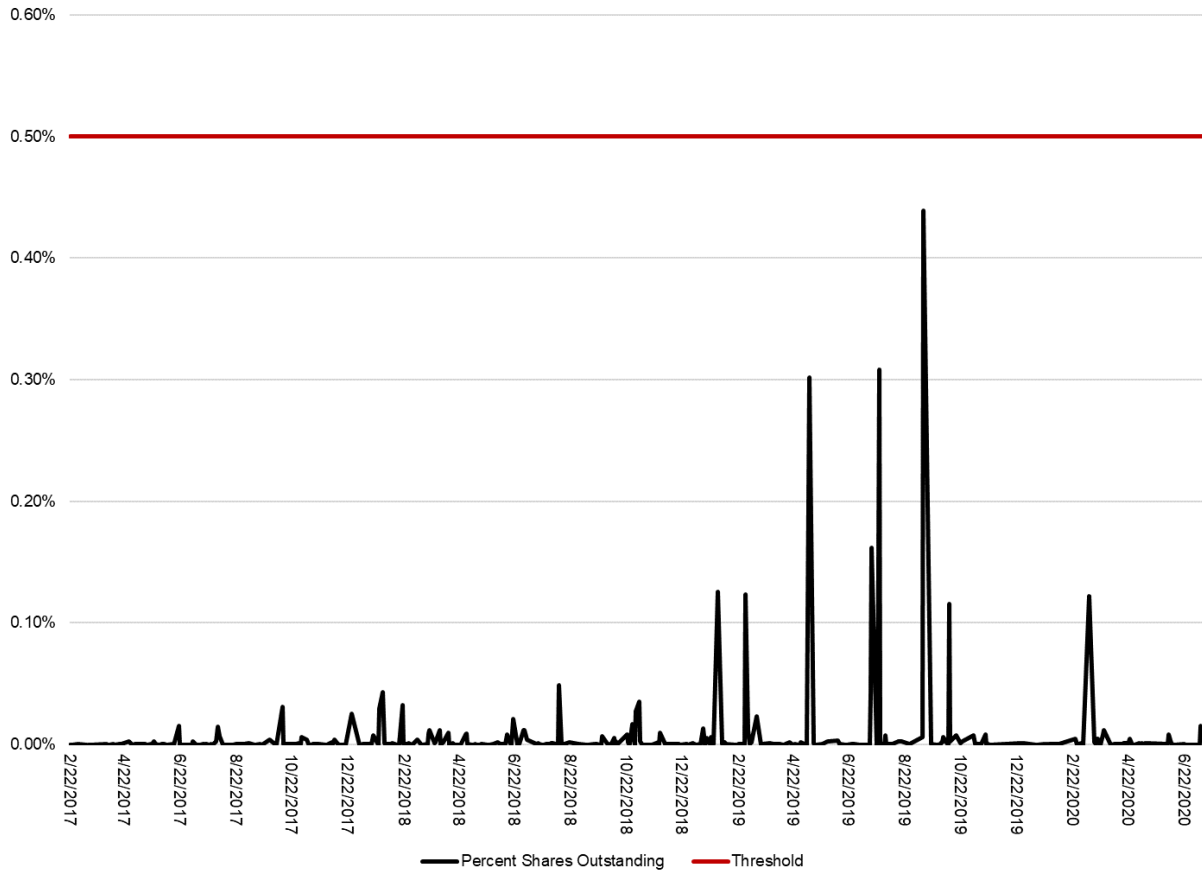
<sup>134</sup> In the context of short selling, fails-to-deliver shares “represent the aggregate net balance of shares that failed to be delivered as of a particular settlement date.” “Fails-to-Deliver Data,” SEC, <https://www.sec.gov/data/foiadocsfailsdatahtm>; “Threshold Securities,” SEC, <https://www.investor.gov/introduction-investing/investing-basics/glossary/threshold-securities>.

<sup>135</sup> “Threshold Securities,” SEC, <https://www.investor.gov/introduction-investing/investing-basics/glossary/threshold-securities>.

<sup>136</sup> SEC Rule 203(c)(6).

<sup>137</sup> SEC Rule 203(c)(6).

<sup>138</sup> *In the Matter of Gary S. Bell*, SEC Release No. 65941, Dec. 13, 2011 (noting that “threshold securities are hard-to-borrow and therefore command large fees in the stock loan market”).

**Chart 2. FE Failed-to-Deliver Shares<sup>139</sup>**

100. The lack of evidence of persistent short sale constraints for FE common stock further supports the inference that FE stock traded in an efficient market during the Class Period.

#### **D. Conclusion**

101. I understand courts have not established a single test to determine whether a security trades in an efficient market; rather, a finding of market efficiency is based on multiple factors.<sup>140</sup> The following table summarizes my findings for each of the factors I examined.

<sup>139</sup> Fails-to-Deliver Data, SEC, <https://www.sec.gov/data/foiadocsfailsdata.htm>; shares outstanding as reported by Bloomberg.

<sup>140</sup> *Cammer*, 711 F. Supp. at 1287.

**Table 1. Summary of Market Efficiency Findings**

| <b>Factor</b>  | <b>Results</b>  | <b>Supports EMH</b> |
|--|---|---------------------|
| <b><i>Cammer Factors</i></b>   |   |                     |
| Stock trading volume   | 4.4 percent average weekly turnover during Class Period   | Yes                 |
| Number of analysts and news outlets following and reporting on stock   | At least 18 analysts covering FE in average month; over 450 analyst reports and 1,000 general media reports during the Class Period | Yes                 |
| Market makers and institutional investors                              | At least 11 market makers and high proportion of institutional ownership  | Yes                 |
| Eligibility to file an S-3 registration statement                      | Eligible during Class Period  | Yes                 |
| Cause-and-effect relationship between events and stock price movements | Statistically significant differences between Release Days and non-Release Days   | Yes                 |
| <b><i>Krogman Factors</i></b>  |   |                     |
| Market capitalization  | Greater than \$12.5 billion   | Yes                 |
| Public Float   | 99 percent of shares publicly floated   | Yes                 |
| Bid-ask spread   | Average spread of 0.03 percent  | Yes                 |
| <b><i>Additional Factors</i></b>                                       |   |                     |
| Financial market   | Traded on the NYSE  | Yes                 |
| Statistical properties   | Tests indicate that historical information does not predict returns   | Yes                 |
| Constraints on short selling   | No constraints  | Yes                 |

102. Shares that trade in an efficient market do not necessarily have to meet each of the above criteria. Shares of FirstEnergy's common stock, however, met each of these criteria throughout the Class Period. In my opinion, FirstEnergy's stock traded in an efficient market, which is supported by my analysis of the *Cammer*, *Krogman*, and other factors.

## VII. Measuring Damages to Shareholders on a Class-wide Basis

103. Under Plaintiffs' liability theory, Defendants' alleged violations of the federal securities laws caused FirstEnergy common stock to trade at artificially inflated prices during the Class Period by inducing artificial inflation in the price of FirstEnergy common stock and maintaining existing artificial inflation. According to Plaintiffs, individual shareholders were harmed to the extent they experienced losses arising from such artificial inflation.

104. The inflation in FirstEnergy's common stock, if any, can be measured using widely accepted valuation and economic techniques. Estimating share price inflation often begins by analyzing the impact of the curative events. When previously withheld information was disclosed to the market, artificial price inflation was removed from FirstEnergy's stock price. Curative events therefore indicate the extent to which the share price had been inflated by alleged material misrepresentations or omissions and, as a result, may be used to estimate share price inflation in semi-strong form efficient markets.

105. Given that FirstEnergy's shares traded in a semi-strong form efficient market, the share price reactions to new, value-relevant information appropriately reflected the effects of such events on the share price. Therefore, one can measure the impact of a curative event on FirstEnergy's share price using the abnormal returns, if any, following such disclosure using an event study approach.

106. In cases where the abnormal return following a curative event is statistically significant, it may be reasonable to conclude that the return was caused by the event in question provided the news became available and was disseminated to the market at the time of (or just prior to) the abnormal movement. Under these circumstances, and as discussed further below, the abnormal return may be used as an estimate of the event's effect on the value of the company's shares.

107. To the extent that there are issues complicating the quantification of artificial inflation at the time of a curative event, standard financial analysis and valuation tools can be applied to measure inflation and damages in accordance with Plaintiffs' theory of liability. For instance, practitioners routinely measure the value of expected earnings using income and market approaches, which may be used to quantify the impact of changes in expectations and perceived risk associated with a business or earnings stream.<sup>141</sup> These techniques may be used to measure the share price impact of alleged misrepresentations directly or to corroborate the observed share price impact of a curative event, as well as to quantify the impact of confounding information, if any, that may have coincided with a curative event.

108. By measuring the impact of allegedly false information (after removing the effects of confounding information, if any) on FirstEnergy's share price, one can estimate the extent (if any) to which

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<sup>141</sup> See, for instance, Shannon P. Pratt, *Valuing a Business: The Analysis and Appraisal of Closely Held Companies* (5th ed. 2008), Chapters 3, 9 and 11. Under the income approach, value today equals future cash flows discounted at the opportunity cost of capital, which reflects the risk associated with those cash flows. The market approach generally applies a multiple to a measure of future income, such as earnings.

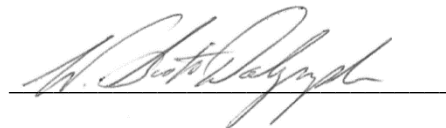
FirstEnergy's share price was inflated due to the alleged violations of the federal securities laws. On this basis, share price inflation can be estimated for any day in the Class Period based on the impact that the alleged violations had on the share price at the time, using standard economic, financial, and valuation techniques to account for any changes in share price inflation levels over time, if appropriate.

109. Once any share price inflation has been estimated for each day of the Class Period, an individual plaintiff's recoverable damages are based on the difference between: (a) share price inflation associated with shares purchased at the time they were purchased; and (b) share price inflation associated with shares sold at the time they were sold after one or more curative events or held through the last of the curative events. Under the Private Securities Litigation Reform Act of 1995 ("PSLRA"), a "plaintiff's damages shall not exceed the difference between the purchase or sale price paid or received, as appropriate, by the plaintiff for the subject security and the mean trading price of that security during the 90-day period beginning on the date on which the information correcting the misstatement or omission that is the basis for the action is disseminated to the market."<sup>142</sup> Additionally, "if the plaintiff sells or repurchases the subject security prior to the expiration of the 90-day period," then "damages shall not exceed the difference between the purchase or sale price paid or received, as appropriate, by the plaintiff for the security and the mean trading price of the security during the period beginning immediately after dissemination of information correcting the misstatement or omission and ending on the date on which the plaintiff sells or repurchases the security."<sup>143</sup>

110. The methods and techniques I describe are widely accepted and may be applied to any and all members of the proposed Class.

### VIII. Further Work

111. My analysis is ongoing, and I reserve the right to supplement my opinions as additional information is made available to me.



W. Scott Dalrymple, CFA  
BVA Group  
Partner

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<sup>142</sup> 15 U.S.C. § 78u-4 (2011).

<sup>143</sup> 15 U.S.C. § 78u-4 (2011).



## SCOTT DALRYMPLE, CFA

PARTNER

## Appendix A

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Scott Dalrymple is an economist specializing in quantitative valuation, econometrics, statistics, securities analysis, antitrust, financial markets, and intellectual property.

Mr. Dalrymple has led numerous consulting, commercial litigation, and restructuring engagements on behalf of multinational companies, investors, financial institutions, and government agencies in the U.S., Europe, and Australia. He has testified in federal and state court and has advised clients in areas including:

- Application of economic, statistical, and quantitative methods used in business interruption matters, securities analysis, financial forecasting, valuation, and antitrust analyses;
- Construction of event studies, market efficiency tests, and other financial econometric models to assess share price artificiality associated with alleged misrepresentations and non-disclosures;
- Quantification of multibillion-dollar claims related to the securitization of residential mortgage-backed assets;
- Estimation of price artificiality arising from alleged manipulations in crude oil futures and options markets through monopolization of cash forward contracts;
- Valuation of residual interests in mortgage-backed securitizations based on loan-level econometric models and simulations;
- Analysis of reasonable royalty and lost profits damages arising from patent infringement claims;
- Development of economic and financial forecast models for purposes of capital restructurings, evaluating investment opportunities, and managing working capital; and
- Design of sampling procedures and statistical inferences drawn from samples used in fraud investigations, product evaluations, accounting reviews, and class certification analyses.

Mr. Dalrymple holds a Master of Science in Economics with a concentration in Industrial Organization from the London School of Economics and Political Science and a Bachelor of Business Administration in Finance and Business Honors from the University of Texas at Austin. He has presented to chapters of the American Bar Association, the Licensing Executives Society, and other organizations on topics including patent infringement damages, quantitative analysis, and macroeconomic trends. Mr. Dalrymple also contributed to the AICPA Practice Aid on Intellectual Property Infringement Damages and has been published in Law360. He is a member of the CFA Society of Dallas–Fort Worth.

Prior to joining BVA, Mr. Dalrymple was with AlixPartners and was an economist in the London office of a global economics consulting firm. Mr. Dalrymple began his career at PricewaterhouseCoopers and also worked in corporate finance and transaction advisory roles for a publicly-traded technology company.

## SCOTT DALRYMPLE, CFA

## Appendix A

PARTNER

### TESTIMONY AND PUBLICATIONS

#### DEPOSITION:

*Robert Strougo, Individually and on behalf of All Others Similarly Situated v. Tivity Health, Inc., et al.*

Civil Action No. 3:20-cv-00165

United States District Court, Middle District of Tennessee, Nashville Division

*Indiana Public Retirement System v. Michael T. Cartwright, et al.*

Civil Action No. 3:19-cv-00407

United States District Court, Middle District of Tennessee, Nashville Division

*St. Clair County Employees' Retirement System, Individually and on Behalf of All Others Similarly Situated v. Acadia Healthcare Company, Inc. et al.*

Civil Action No. 3:18-cv-00988

United States District Court, Middle District of Tennessee, Nashville Division

*Highfields Capital I LP, et al. v. SeaWorld Entertainment, Inc., et al.*

Civil Action No. 3:18-cv-01276

United States District Court, Southern District of California, San Diego

*Farmland Partners Inc., v. Rota Fortuna a/k/a David Quinton Mathews, QKM, L.L.C., et al.*

Civil Action No. 1:18-cv-02351

United States District Court, District of Colorado

*Nikki Bollinger Grae, individually and on Behalf of All Others Similarly Situated, v. Corrections Corporation of America, et al.*

Civil Action No. 3:16-cv-02267

United States District Court, Middle District of Tennessee

*Leaf Trading Cards, LLC v. The Upper Deck Company*

Civil Action No. 3:17-CV-03200-N

United States District Court, Northern District of Texas, Dallas Division

*Samsung Electronics America, Inc., v. All Pro Distributing, Inc., et al.*

Civil Action No. 3:15-CV-04108-D

United States District Court, Northern District of Texas, Dallas Division

*Royal Park Investments SA/NV, Individually and on Behalf of All Others Similarly Situated v. The Bank of New York Mellon, as Trustee*

Cause No. 14-CV-6502

United States District Court, Southern District of New York

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## Appendix A

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*Royal Park Investments SA/NV, Individually and on Behalf of All Others Similarly Situated v. HSBC Bank USA, National Association, as Trustee*

Cause No. 14-CV-08175

United States District Court, Southern District of New York

*Avaya Inc., v. Interactive Intelligence, Inc.*

Cause No. 01-16-0004-7193

AAA Commercial Arbitration

*Royal Park Investments SA/NV, Individually and on Behalf of All Others Similarly Situated v. Wells Fargo Bank, N.A., as Trustee*

Cause No. 14-CV-9764

United States District Court, Southern District of New York

*Royal Park Investments SA/NV, Individually and on Behalf of All Others Similarly Situated v. U.S. Bank National Association, as Trustee*

Cause No. 14-CV-2590

United States District Court, Southern District of New York

*Galt Strategies, LLC v. Critter Control, Inc., Kevin Clark, ABCN Services Corp., et al.*

Cause No. DC-15-05281

162nd Judicial District Court, Dallas County, Texas

*Royal Park Investments SA/NV, Individually and on Behalf of All Others Similarly Situated v. Deutsche Bank National Trust Company, as Trustee*

Cause No. 14-CV-4394

United States District Court, Southern District of New York

*Maxus Healthcare Partners, LLC ("Maxus"), v. Texas RHH, LLC d/b/a Renew Home Health, et al.*

Cause No. 017-275219-14

17<sup>th</sup> Judicial District Court, Tarrant County, Texas

*GTG Holdings, Inc. v. Amvensys Capital Group, LLC, ACG Telecom, LLC, and Z. Edward Lateef*

Case No. 3:13-cv-03107-M

United States District Court, Northern District of Texas, Dallas Division

*In The Matter of the Marriage of Jessica L. Jones and David E. Jones and in the Interest of David E. Jones, Jr., Jackson H. Jones and William A. Jones, Children*

Case No. D-1-FM-13-001139

250<sup>th</sup> Judicial District Court, Travis County, Texas

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## Appendix A

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### TRIAL AND HEARING:

*James JN-Marie, Individually and on behalf of all others similarly situated, v. Spartan Concrete Products, LLC and Heavy Materials, LLC*

Civil Action No. ST-2017-CV-486

Superior Court of the Virgin Islands, Division of St. Thomas & St. John

*Robert Strougo, Individually and on behalf of All Others Similarly Situated v. Tivity Health, Inc., et al.*

Civil Action No. 3:20-cv-00165

United States District Court, Middle District of Tennessee, Nashville Division

*Shirley Jones, Individually and on Behalf of Her IRAs, et al., v. WFG Investments, Inc., WFG Advisors, LP, Wilson H. Williams, and David W. Williams*

Case No. 16-03743

Financial Industry Regulatory Authority

*Smith Walker v. E\*Trade Securities LLC and E\*Trade Clearing LLC*

Case No. 16-03022

Financial Industry Regulatory Authority

*Avaya Inc., v. Interactive Intelligence, Inc.*

Cause No. 01-16-0004-7193

AAA Commercial Arbitration

*Maxus Healthcare Partners, LLC ("Maxus"), v. Texas RHH, LLC d/b/a Renew Home Health, et al.*

Cause No. 017-275219-14

17<sup>th</sup> Judicial District Court, Tarrant County, Texas

*Galt Strategies, LLC v. Critter Control, Inc., Kevin Clark, ABCN Services Corp., et al.*

Cause No. DC-15-05281

162<sup>nd</sup> Judicial District Court, Dallas County, Texas

*Edward Kennard Andrew and Mark L. Hepworth v. Southwest Securities, Inc.*

Case No. 14-02566

Financial Industry Regulatory Authority

*In the Matter of the Marriage of Jessica L. Jones and David E. Jones and in the Interest of David E. Jones, Jr., Jackson H. Jones and William A. Jones, Children*

Case No. D-1-FM-13-001139

250<sup>th</sup> Judicial District Court, Travis County, Texas

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## Appendix A

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### PRESENTATIONS AND PUBLICATIONS:

Co-Author (with Jody Bland and Todd Goldwasser), “The SEC’s Modernized Marketing Rule and Performance Measurement Issues for Investment Advisers,” *Securities Regulation Law Journal*, Vol. 49 No. 3, Fall 2021.

Co-Author (with Joseph R. Mason and Jody Bland), “Collateralized Loan Obligations: Overview and Challenges,” *BVA Group*, May 14, 2020.

Co-Author (with Robert Manz and Emily Chiu), “COVID-19 Business Interruption Claims: Causation May be Key,” *BVA Group*, April 24, 2020.

Co-Author (with Joseph R. Mason and Jeffrey D. Balcombe), “Financial Supervision and Regulation in the US: Dodd-Frank Reform,” *European Parliament*, December 2018.

Contributing Author, Hitchner, James R., *Financial Valuation: Applications and Models*, Fourth Edition, April 2017.

*Series N and Super Priority Preferred: The Unintended Consequences of Increasing Complexity in Today’s Capital Markets*, Houston Bar Association Securities Litigation and Arbitration Section, April 11, 2017.

Co-Author, “Don’t Shoot the Methodology: Use and (Mostly) Misuse of the Nash Bargaining Solution,” *Law360*, March 2014.

*Economic Factors That Influence Royalties: Application of Game Theory*, LES Seattle Chapter Presentation, November 14, 2013.

*Bargaining Power in Licensing Negotiations*, LES San Diego Chapter Presentation, March 12, 2013.

*Bargaining Theory in Reasonable Royalty Calculations*, ABA Webinar, December 14, 2012.

Contributing Author, “Calculating Intellectual Property Infringement Damages,” AICPA Practice Aid 06-1, 2012.

### AFFILIATIONS:

The Economic Club of Washington D.C., panelist judge for the Philip M. Dearborn and Vernon E. Jordan fellowships for graduate students pursuing doctoral degrees in the fields of economics, finance, and business, 2014 to 2020.

CFA Institute and CFA Society of Dallas–Fort Worth.

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## Appendix A

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### PARTIAL LIST OF CASES

Mr. Dalrymple has been involved with the following types of cases in a consulting and/or testifying capacity:

#### VALUATION AND SECURITIES ANALYSIS

- Provided expert and rebuttal opinions on share price inflation and aggregate damages on behalf of a former Australian electronics retail chain.
- Provided expert testimony on damages and losses on behalf of a broker/dealer arising from a series of private placement investments and offerings.
- Quantified the impact of trustees' alleged failures to repurchase loans on behalf of a residential mortgage backed securitization (RMBS) investor.
- Developed a class-wide damage model arising from suitability claims against an investment bank.
- Provided expert testimony in support of class certification on behalf of residential mortgage backed securitization (RMBS) holders.
- Analyzed market efficiency in support of fairness and solvency opinions related to shares of publicly traded companies in the energy sector.
- Prepared event studies and damages analyses based on various share matching (LIFO, FIFO, offsets) and account consolidation conventions on behalf of security holders evaluating class action opt outs.
- Analyzed trading activity and valuations of restricted and unrestricted shares associated with an alleged pump-and-dump scheme following a reverse merger.
- Provided expert opinions and rebuttal of opposing expert analysis regarding share price inflation damages on behalf of an Australian industrial conglomerate involved in a shareholder class action lawsuit.
- Served as a testifying expert in an arbitration matter involving the liquidation of margin positions.
- Provided economic and statistical analysis of loan collateral characteristics, performance, and alleged misrepresentations associated with residential and commercial mortgage-backed securities on behalf of multinational financial institutions and investors.
- Developed econometric models to establish relationships between crude oil futures and options prices and numerous industrial, financial, and macroeconomic variables in a securities class action lawsuit.
- Provided expert testimony on the valuation of a healthcare services company.
- Served as a consulting expert for government agencies in negotiations of multibillion-dollar settlements involving the origination, sale, and securitization of residential mortgages.
- Negotiated the value of residual interests in Canadian mortgage-backed securities on behalf of the bankrupt sponsor based on econometric models and Monte Carlo simulations used to predict future cash flows from individual mortgages.

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## Appendix A

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- Provided expert opinions the solvency of a debtor subsidiary in the telecom industry facing fraudulent transfer allegations.
- Analyzed the economic merits of civil penalties assessed by the U.S. SEC related to the sale of restricted stock.
- Assessed the appropriateness of certain private equity investments related to the investment policy statement of a family limited partnership.
- Evaluated the economic merits of breach of fiduciary duty claims related to options trading strategies in a jointly-held investment account.
- Quantified share price inflation damages on behalf of an Australian contracting and development company involved in a shareholder class action lawsuit.
- Evaluated share price inflation allegations against an Australian real estate investment trust and quantified damages based on multiple share purchase matching approaches and detailed trading data in a shareholder class action lawsuit.
- Analyzed plaintiff and defendant shareholder damages models related to claims against an Australian commodities company in a shareholder class action lawsuit.
- Investigated quantitative methods used to value the structured credit portfolios of a global investment and insurance company.
- Advised a major U.S. bank on the write-down of its structured finance portfolio.
- Quantified share price inflation and corresponding damages based on allegations against an Australian gaming corporation in a shareholder class action lawsuit.
- Analyzed the effects of management representations on a U.S. technology firm's share price in a shareholder class action lawsuit.
- Examined the impact of accounting scandal revelations on the share price of a U.S. media firm in a shareholder class action lawsuit.
- Constructed a Monte Carlo simulation to estimate the value of performance-based incentives in the UK media industry.

### ANTITRUST AND REGULATION

- Provided expert testimony on relevant market definitions, market power, and vertical restraints of competition on behalf of a manufacturer in a case involving allegations of market foreclosure.
- Quantified damages on behalf of a plaintiff class alleging overcharges on purchases of accessory items.
- Provided expert opinions in support of class certification in a case involving alleged overcharges of building materials.
- Quantified the impact of price artificiality associated with alleged market manipulations in crude oil futures and options markets.
- Assessed the impact of monopolization claims on prices in the European automobile parts market.

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- Evaluated monopolization claims in the market for remanufactured printer cartridges.
- Analyzed the price impact of alleged false advertising claims in the market for fruit juices.
- Assisted a European competition authority in a review of its financial services sector based on event studies used to estimate the effect of firm entry on lending rates.
- Examined the impact of competition policies on the personal banking sector in a national European market based on quantitative analysis of current account activity associated with major banks.
- Analyzed the impact of a UK pharmaceutical firm's alleged predatory pricing behavior on sales of its primary competitor.
- Quantified the impact of regulatory and commercial changes on a portfolio of media and gambling rights in the UK.
- Developed an industrial analysis framework used to evaluate competitive drivers across several manufacturing sectors for purposes of valuing a European manufacturing firm.

### INTELLECTUAL PROPERTY

- Provided testimony rebutting an opposing expert's lost profits calculations arising from claims of intellectual property infringement, trade secret misappropriations, tortious interference and other allegations.
- Led the analysis of reasonable royalty damages on behalf of more than 150 defendants alleged to infringe a single patent covering widely-used website features related to geographic location services.
- Provided expert testimony regarding the economics of contractual royalty calculations on behalf of a U.S. communications company.
- Served as a testifying expert on behalf of a consulting firm seeking damages arising from alleged misappropriations of trade secrets.
- Assessed the merits of trade secret misappropriation claims against a global energy services company.
- Evaluated reasonable royalty claims associated with alleged U.S. patent infringements related to numerous technologies, including:
  - Telephony and cellular network;
  - Network architecture;
  - Hardware and software technology;
  - Digital media;
  - Remote access technologies;
  - Power converter architectures;
  - E-commerce;
  - Garments and apparel;
  - Automotive parts;

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## SCOTT DALRYMPLE, CFA

## Appendix A

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### PARTNER

- Food processing;
  - Methods for check payment processing;
  - Geographic location services; and
  - Oil and gas exploration.
- Advised patent holders on strategic opportunities and licensing strategy for purposes of monetizing patent portfolios in the network technology and electronic storage industries.
- Computed lost profits, unjust enrichment, and reasonable royalty damages arising from theft of trade secrets claims brought by a specialized provider of electronic components against former employees.
- Assessed damages associated with contingency fee agreements between a law firm and former client arising from the settlement of a patent litigation lawsuit.
- Analyzed lost profits damages arising from patent infringement claims covering a wide range of network, software, and industrial applications.
- Composed a series of intellectual property valuations submitted to European tax authorities on behalf of a global steel manufacturer.
- Assessed the economic merits of an injunction claims against a major provider of rail track inspection services.
- Evaluated price erosion claims on behalf of defendants accused of patent infringement in industrial applications.
- Assessed damages arising from trade secret claims involving tens of millions of transactions in the freight industry.
- Evaluated damages arising from trademark infringement claims against companies in the financial services, technology, and automotive industries.

### COMMERCIAL LITIGATION AND INVESTIGATIONS

- Designed sampling procedures and advised on statistical inferences drawn from samples used in numerous fraud investigations, accounting reviews, and class certification analyses.
- Provided expert opinions based on statistical and econometric models used to evaluate employee allegations of discrimination under U.S. Title VII.
- Led the sampling, investigation, and extrapolation of results from transaction data retrieved from various accounting systems for purposes of identifying unreported IT costs in a breach of contract dispute involving a major U.S. hospital network.
- Provided expert opinions on lost wages associated with an alleged wrongful termination of a public services officer.
- Assessed damages associated with contingency fee agreements between a law firm and former client arising from the settlement of a patent litigation lawsuit.
- Constructed a series of econometric and financial models used to evaluate breach of contract claims in the freight and shipping industry based on the analysis of tens of millions of individual shipping records.

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## **SCOTT DALRYMPLE, CFA**

## **Appendix A**

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### **PARTNER**

- Quantified the effects of a U.S. publicity scandal on Japanese sales of celebrity-sponsored products based on a quantitative analysis of sales data, controlling for numerous macroeconomic factors.
- Analyzed the forgone acquisition value of a UK retailer due to an alleged breach of fiduciary duty.

### **TURNAROUND AND RESTRUCTURING**

- Assisted a regional hospital in preparing for Chapter 11 proceedings.
- Implemented a weekly cash projection process and advised on working capital strategies that enabled a U.S. manufacturer to operate within its asset-based facility.
- Managed the implementation of financial models and weekly cash management processes on behalf of a U.S. metals distributor.
- Developed a series of integrated financial models that enabled a public U.S. technology firm to evaluate restructuring opportunities and secure long-term and short-term funding.
- Implemented a short-term cash management tool and monthly strategic model for a private equity portfolio company
- Developed cash forecast and liquidation models on behalf of creditors of a U.S. metal fabricator.
- Assisted a U.S. hospital operator in developing financial plans used to secure additional funding.
- Estimated the impact of an audit firm's alleged misrepresentations on the unsecured claims against a U.S. company's bankrupt estate.
- Quantified the value of life insurance and executive benefit claims against a U.S. bankruptcy estate based on various actuarial assumptions.
- Advised on the reliability of a U.S. distributor's financial model and business plan based on a series of financial and statistical tests.
- Negotiated the settlement of numerous claims on behalf of a U.S. bankruptcy estate.
- Managed bankruptcy proceedings on behalf of a regional U.S. electronics chain.

### **BUSINESS ADVISORY AND CORPORATE FINANCE**

- Designed econometric models to measure revenue impacts of product placements for a global consumer product company.
- Advised a U.S. freight company on the design and implementation of financial and economic forecasting tools.
- Designed sampling procedures to optimize new sporting goods product tests given limited access to college-level athletes.
- Identified demand drivers for an equipment manufacturer based on econometric analyses of distribution channels and inventory levels.

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## SCOTT DALRYMPLE, CFA

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## Appendix A

### PARTNER

- Developed a comprehensive IT framework that enabled a U.S. manufacturer to project short-term borrowing requirements in a consolidated database/ERP system.
- Designed weekly cash management and monthly financial reporting tools for multiple private equity portfolio companies in the marketing and broadcast industries.
- Managed numerous projects for a public U.S. technology firm, including: product pricing and bundling analysis, development of operational metrics, and the redesign of the commission structure.
- Designed and implemented automation tools used in numerous business planning and reporting applications for clients in the retail, shipping, and manufacturing sectors.
- Advised a commercial real estate client on the sale of a major U.S. shopping mall.

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## In re FirstEnergy Corp Securities Litigation

### Appendix B - Information Considered

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## In re FirstEnergy Corp Securities Litigation

### Appendix B - Information Considered

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## In re FirstEnergy Corp Securities Litigation

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## In re FirstEnergy Corp Securities Litigation

### Appendix B - Information Considered

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## In re FirstEnergy Corp Securities Litigation

### Appendix B - Information Considered

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## In re FirstEnergy Corp Securities Litigation

### Appendix B - Information Considered

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## In re FirstEnergy Corp Securities Litigation

### Appendix B - Information Considered

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## In re FirstEnergy Corp Securities Litigation

### Appendix B - Information Considered

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## In re FirstEnergy Corp Securities Litigation

### Appendix B - Information Considered

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- (19) "Threshold Securities," *SEC*, <https://www.investor.gov/introduction-investing/investing-basics/glossary/threshold-securities>
- (20) *In the Matter of Gary S. Bell*, SEC Release No. 65941, Dec. 13, 2011
- (21) "Market Capitalization," *Investor.gov*, <https://www.investor.gov/introduction-investing/investing-basics/glossary/market-capitalization#:~:text=Market%20capitalization%20is%20the%20value,number%20of%20total%20outstanding%20shares>
- (22) 15 U.S.C. § 78u-4 (2011)
- (23) SEC Rule 203(c)(6)
- (24) SEC filings
- (25) S&P Capital IQ
- (26) Bloomberg LP

**Exhibit 1****In re FirstEnergy Corp Securities Litigation  
List of Disclosed Market Makers**


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| <b>Market Maker</b> | <b>Notes</b> |
|---------------------|--------------|
| Bank of America     | (1)          |
| Barclays            | (2)          |
| BMO Capital Markets | (3)          |
| Deutsche Bank       | (4)          |
| Jefferies           | (5)          |
| J.P. Morgan         | (6)          |
| KeyBanc             | (7)          |
| Morgan Stanley      | (8)          |
| RBC Capital Markets | (9)          |
| UBS                 | (10)         |
| Wells Fargo         | (11)         |

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**Sources and Notes:**

- (1) See, e.g., Bank of America Merrill Lynch, "Hand holding FES with credit causes consternation on 4Q16 call," February 22, 2017, p. 3
- (2) See, e.g., Barclays, "Progress Toward Regulated Only," February 22, 2017, p. 10
- (3) See, e.g., BMO Capital Markets, "FES Bankruptcy Deferred," April 30, 2017, p. 4
- (4) See, e.g., Deutsche Bank, "Putting the past in the past," August 1, 2018, p. 3
- (5) See, e.g., Jefferies, "Wait a ZEC," February 23, 2017, p. 7
- (6) See, e.g., J.P. Morgan, "Model Update," February 22, 2017, p. 4
- (7) See, e.g., KeyBanc, "FE: Raising 2017 Estimate After Generation Impairment," February 22, 2017, p. 3
- (8) See, e.g., Morgan Stanley, "Overweight View Intact; Addressing the Bearish Concerns," February 23, 2017, p. 9
- (9) See, e.g., RBC Capital Markets, "Still Early Innings of Transformation," February 24, 2017, p. 13
- (10) See, e.g., UBS, "Increased 2017 EPS guidance does not reflect any changes in fundamentals," February 23, 2017, p. 12
- (11) See, e.g., Wells Fargo, "FE: Valuation Intriguing--But (Potential) Tax Reform Troublesome," February 22, 2017, p. 4

**Exhibit 2*****In re* FirstEnergy Corporation Securities Litigation  
Summary of Release Days**

| Actual<br>Release Date | Timing      | Tested<br>Release Date | FirstEnergy<br>Log Return | Abnormal<br>Log Return | Volume     | % Daily Trading<br>Volume | P Values | Significance |          |
|------------------------|-------------|------------------------|---------------------------|------------------------|------------|---------------------------|----------|--------------|----------|
|                        |             |                        |                           |                        |            |                           |          | 10% Level    | 5% Level |
| 2/21/2017              | After Close | 2/22/2017              | -1.7%                     | -2.1%                  | 6,792,905  | 150.6%                    | 0.0443   | ✓            | ✓        |
| 4/27/2017              | After Close | 4/28/2017              | -1.9%                     | -1.4%                  | 9,610,023  | 213.1%                    | 0.1729   |              |          |
| 7/27/2017              | After Close | 7/28/2017              | 2.8%                      | 3.1%                   | 10,070,829 | 223.3%                    | 0.0002   | ✓            | ✓        |
| 10/26/2017             | After Close | 10/27/2017             | 1.6%                      | 1.1%                   | 5,708,770  | 126.6%                    | 0.1431   |              |          |
| 2/20/2018              | After Close | 2/21/2018              | -0.1%                     | 1.2%                   | 12,353,141 | 273.9%                    | 0.2538   |              |          |
| 4/23/2018              | Before Open | 4/23/2018              | 0.2%                      | 0.0%                   | 6,854,191  | 152.0%                    | 0.9755   |              |          |
| 7/31/2018              | After Close | 8/1/2018               | 2.9%                      | 3.7%                   | 7,429,912  | 164.8%                    | 0.0003   | ✓            | ✓        |
| 10/25/2018             | After Close | 10/26/2018             | -3.2%                     | -1.6%                  | 7,817,475  | 173.4%                    | 0.1015   |              |          |
| 11/9/2018              | After Close | 11/12/2018             | 2.1%                      | 2.1%                   | 4,099,020  | 90.9%                     | 0.0268   | ✓            | ✓        |
| 2/19/2019              | After Close | 2/20/2019              | 0.0%                      | -0.5%                  | 6,189,212  | 137.2%                    | 0.4550   |              |          |
| 4/23/2019              | After Close | 4/24/2019              | 0.3%                      | -0.2%                  | 3,941,570  | 87.4%                     | 0.7242   |              |          |
| 7/23/2019              | After Close | 7/24/2019              | 0.7%                      | 0.6%                   | 4,656,687  | 103.3%                    | 0.3423   |              |          |
| 11/4/2019              | Before Open | 11/4/2019              | -0.7%                     | 0.4%                   | 6,826,273  | 151.4%                    | 0.5354   |              |          |
| 11/8/2019              | After Close | 11/11/2019             | -1.2%                     | -0.6%                  | 5,079,633  | 112.6%                    | 0.3237   |              |          |
| 2/7/2020               | Before Open | 2/7/2020               | 0.0%                      | 0.3%                   | 2,784,843  | 61.8%                     | 0.5906   |              |          |
| 4/23/2020              | After Close | 4/24/2020              | -1.7%                     | -2.7%                  | 5,716,716  | 126.8%                    | 0.0020   | ✓            | ✓        |

**Sources and Notes:**

Earnings release dates and timing of releases based on FirstEnergy 8-Ks and Bloomberg LP database.

Dividend announcements based on FirstEnergy press releases dated November 9, 2018 and November 8, 2019.